

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

In re

DETERMINATION OF ROYALTY
RATES AND TERMS FOR
EPHEMERAL RECORDING AND
DIGITAL PERFORMANCE OF
SOUND RECORDINGS (*WEB IV*)

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) Docket No. 14-CRB-0001-WR (2016-2020)
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DECLARATION OF TODD D. LARSON

1. I am a Partner in the law firm of Weil, Gotshal & Manges LLP. I am counsel for Pandora Media, Inc. ("Pandora") in the above-captioned proceeding. I respectfully submit this declaration in support of the motion by Pandora, iHeartMedia, Inc., the National Association of Broadcasters, the National Religious Broadcasters Noncommercial Music License Committee, and Sirius XM Radio Inc. to compel SoundExchange, Inc. to produce negotiating documents directly relating to its written direct statement. I have personal knowledge of the facts stated herein.

2. Attached hereto as Exhibit A is a true and correct copy of excerpts of SoundExchange, Inc.'s Responses and Objections to Licensee Participants' First Set of Requests for Production of Documents, dated November 7, 2014.

3. On November 19, 2014, counsel for SoundExchange, Inc. and several of the Licensee Participants met and conferred via teleconference. During that call, counsel for SoundExchange indicated that SoundExchange would be willing to consider producing

negotiating documents from a narrow list of specific services if the Licensee Participants proposed such a list.

4. On November 25, 2014, I e-mailed SoundExchange's counsel a list of ten specific services for which Pandora, NAB, and Sirius XM were requesting production of internal and external negotiating documents. SoundExchange's counsel replied to my e-mail on November 26, 2014. Attached hereto as Exhibit B is a true and correct copy of those e-mails.

5. Attached hereto as Exhibit C is a true and correct copy of an excerpt showing Request No. 15 from SoundExchange's First Set of Requests for Production of Documents to Pandora Media, Inc. In response to SoundExchange's requests, Pandora conducted a thorough document collection and privilege review and produced, *inter alia*, over 38,000 pages of information related to its direct license with Merlin, including non-privileged internal documents discussing the negotiation and implementation of that agreement.

6. Attached hereto as Exhibit D is a true and correct copy of the Motion to Compel SoundExchange to Produce Negotiating Documents Related to Its Direct Statement, Docket No. 2005-1 CRB DTRA (Mar. 6, 2006)).

7. Attached hereto as Exhibit E is a true and correct copy of the Motion to Compel SoundExchange to Produce Label License Agreements and Related Negotiation Documents, Docket No. 2006-1 CRB DSTRA (April 27, 2007).

8. Attached hereto as Exhibit F is a true and correct copy of SoundExchange, Inc.'s Responses and Objections to the First Set of Interrogatories From the Licensee Participants, dated November 8, 2014.

Pursuant to 28 U.S.C. § 1746 and 37 C.F.R. § 350.4(e)(1), I hereby declare under the penalty of perjury that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: December 8, 2014
New York, NY

Todd D. Larson /JMH

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Counsel for Pandora Media, Inc.

Exhibit A

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re:)	
)	
DETERMINATION OF ROYALTY)	Docket No. 14-CRB-0001-WR (2016-2020)
RATES AND TERMS FOR EPHEMERAL)	
RECORDING AND DIGITAL)	
PERFORMANCE OF SOUND)	
RECORDINGS (<i>WEB IV</i>))	

SOUNDEXCHANGE, INC.'S RESPONSES AND OBJECTIONS TO LICENSEE
PARTICIPANTS' FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS

GENERAL OBJECTIONS

1. SoundExchange, Inc. ("SoundExchange") objects to the Requests, including all Definitions and Instructions, to the extent they purport to impose upon SoundExchange requirements that exceed or are inconsistent with 17 U.S.C. § 803(b), 37 C.F.R. § 351.5, and any other applicable rule or order governing this proceeding, including applicable prior precedent.
2. SoundExchange objects to the Requests, including all Definitions and Instructions, to the extent they seek documents that are not "directly related" to SoundExchange's written direct statement. See 17 U.S.C. § 803(b)(6)(C)(v), 37 C.F.R. § 351.5(b).
3. SoundExchange objects to the Requests, including all Definitions and Instructions, to the extent they are ambiguous, duplicative, and/or vague.
4. SoundExchange objects to the Requests, including all Definitions and Instructions, to the extent they are oppressive, harassing, overbroad and/or unduly burdensome.

5. SoundExchange objects to the Requests, including all Definitions and Instructions, to the extent they are not limited to time periods reasonably related to the matters at issue in this proceeding. Unless otherwise indicated in response to a particular Request, SoundExchange will provide responsive documents for the time period beginning January 1, 2011 through those documents most recently available at the close of discovery.

6. SoundExchange object to the Requests, including all Definitions and Instructions, to the extent they are not limited in geographic scope to those matters at issue in this proceeding. Unless otherwise indicated in response to a particular Request, SoundExchange will produce responsive information as related to the United States or worldwide if it includes the United States.

7. SoundExchange objects to the Requests, including all Definitions and Instructions, to the extent they call for information that is already in the possession of the parties propounding these Requests, information that is publicly available and readily accessible, or information already produced in this proceeding. Such Requests are overbroad, unduly burdensome, oppressive, and harassing, and would needlessly increase the cost of this proceeding.

8. SoundExchange objects to the Requests, including all Definitions and Instructions, to the extent they seek information or documents protected from discovery under any statute, regulation, agreement, protective order or privilege, including, but not limited to, the attorney-client privilege and work-product doctrine. SoundExchange will not produce any document so protected. Any inadvertent disclosure of such information shall not be deemed a waiver of the attorney-client privilege, the attorney work-product doctrine, and any other applicable privilege or doctrine.

9. A statement herein that SoundExchange will produce documents responsive to a Request does not indicate and should not be construed to mean that SoundExchange agrees, admits or otherwise acknowledges the characterization of fact or law or the factual expressions or assumptions contained in the Request, that the scope of the Request is consistent with the discovery permitted in this proceeding, that the documents are relevant or admissible.

10. SoundExchange objects to the Requests, including all Definitions and Instructions, to the extent they seek to impose obligations on any member of SoundExchange that is not a participant in this proceeding and/or has not provided a witness in this proceeding, on the bases that such Requests are not "directly related" to SoundExchange's written direct statement and are oppressive, harassing, overbroad and unduly burdensome.

11. SoundExchange objects to the Requests, including all Definitions and Instructions, to the extent they seek documents that are not in the possession, custody, or control of SoundExchange, including documents from other parties or members of SoundExchange.

12. SoundExchange objects to the Requests, including all Definitions and Instructions, to the extent any particular Request seeks documents and responses from multiple companies, entities or people. Moreover, SoundExchange objects to the extent the Requests are compound and include discrete sub-parts. Such Requests constitute multiple document requests under the parties' Agreement regarding the Discovery Schedule as submitted to the Judges on July 29, 2014 ("Discovery Schedule").

13. SoundExchange objects to the Requests, including all Definitions and Instructions, to the extent they refer to specific witness testimony yet seek documents from other witnesses or entities that do not address the same subject matter, as not "directly related" to SoundExchange's written direct statement, overbroad, harassing and unduly burdensome.

14. SoundExchange objects to the Requests, including all Definitions and Instructions, to the extent they seek "all" documents of a certain nature, as vague, ambiguous, overbroad and unduly burdensome.

15. SoundExchange objects to the Requests, including all Definitions and Instructions, to the extent they mischaracterize or misquote testimony, or quote or refer to testimony out of context.

16. SoundExchange objects to the Requests, including all Definitions and Instructions, to the extent they seek documents in relation to general testimony that was based on a witness's knowledge, experience, and/or generally acknowledged facts.

17. SoundExchange objects to the Requests, including all Definitions and Instructions, to the extent they seek to require the creation of documents or the compilation of documents in a manner different from the manner in which they are maintained in the ordinary course of business.

18. SoundExchange objects to the Requests, including all Definitions and Instructions, to the extent they seek documents which the parties have, by written agreement, agreed not to seek from or produce to one another.

19. By agreeing to search for or produce documents responsive to any particular Request, SoundExchange does not represent that such documents exist or that they are in the possession, custody or control of SoundExchange, an entity submitting testimony or a witness, or that all documents responsive to the Request fall within the permissible scope of discovery or will be produced.

20. SoundExchange reserves any and all objections to the use or admissibility in this or any proceeding of any information, material, documents identified, produced or disclosed in response to the Requests.

21. The responses and objections contained herein are made to the best of SoundExchange's present knowledge, belief and information, and are based on a reasonable and diligent search. SoundExchange reserves the right to amend or supplement its objections and responses based on, among other reasons, its continuing investigation of this matter, further review, or later acquisition of responsive information.

OBJECTIONS TO DEFINITIONS

SoundExchange objects as follows to the Definitions:

22. SoundExchange objects to the definition of "Digital Service" in Definition No. 1 as overbroad because it purports to define the relevant universe of services without limitation to issues that are relevant to this proceeding and in such a manner that would defeat the statutory provisions defining discoverable material. To the extent the Requests purport to impose an obligation to produce documents related to all of the types of services included in the overbroad definition, SoundExchange objects to the definition as purporting to require the production of documents not "directly related" to SoundExchange's written direct statement, and as overbroad, unduly burdensome, oppressive, harassing and not reasonably limited to subject matters at issue in this proceeding.

23. SoundExchange objects to the definition of "Record Company" in Definition No. 6 as overbroad, unduly burdensome, oppressive, harassing and not beyond the scope of permissible discovery in this proceeding, to the extent it seeks to impose obligations on the thousands of SoundExchange record company members that are not participants in this

proceeding and have not provided a witness in this proceeding, and to the extent it defines a record company to include all companies related to it. Subsidiary and/or affiliate recording companies and record labels within Sony Music Entertainment, Universal Music Group, and Warner Music Group are distinct entities and the documents of these distinct entities are not within the custody and/or control of SoundExchange and/or its witnesses.

24. SoundExchange objects to the definition of "Recording Industry Association of America" and "RIAA" in Definition No. 7 because RIAA is not a participant in this proceeding and has not provided a witness in this proceeding. SoundExchange further objects to the definition as overbroad to the extent it refers to affiliated companies, which could be interpreted to refer to hundreds of record companies, and to the extent it purports to include anyone acting on RIAA's behalf.

25. SoundExchange objects to the definition of "Sony" in Definition No. 8 as overbroad to the extent it purports to impose an obligation to collect documents from an unreasonably wide array of people and entities, including numerous record labels and anyone acting on Sony's behalf.

26. SoundExchange objects to the definition of "SoundExchange," "you" and "your" in Definition No. 10 as overbroad, oppressive, harassing, and unduly burdensome to the extent that its reference to "affiliated companies" seeks to impose obligations on the thousands of record companies to whom SoundExchange distributes royalty payments. SoundExchange also objects to the definition as overbroad and vague to the extent it purports to impose obligations on anyone acting on SoundExchange's behalf.

27. SoundExchange objects to the definition of "SoundExchange Witness" in Definition No. 11 as overbroad and unduly burdensome to the extent it seeks documents from

witnesses who "will supply testimony" in this proceeding, but who have not yet been disclosed or identified as direct case witnesses.

28. SoundExchange objects to the definition of "Warner" and "WMG" in Definition No. 12 as overbroad and unduly burdensome to the extent it purports to impose an obligation to collect documents from an unreasonably wide array of people and entities, including numerous record labels that did not provide witnesses and anyone acting on WMG's behalf.

29. SoundExchange objects to the definition of "UMG" in Definition No. 13 as overbroad and unduly burdensome to the extent it purports to impose an obligation to collect documents from an unreasonably wide array of people and entities, including numerous record labels that did not provide witnesses and anyone acting on UMG's behalf.

30. SoundExchange objects to the definitions of "and" and "or", and "any" and "all" in Definition No. 14 to the extent they are overbroad, vague, ambiguous and unduly burdensome. SoundExchange further objects to the definition of "including" to the extent it purports to impose obligations beyond the scope of the applicable statute and regulations governing discovery in this proceeding, including 17 U.S.C. § 803(b), 37 C.F.R. § 351.5, and any other applicable rule or order governing this proceeding.

OBJECTIONS TO INSTRUCTIONS

31. SoundExchange objects to the Instructions to the extent they seek to impose obligations that are inconsistent with or not supported by the governing statute, regulations, orders, or the Discovery Schedule.

32. SoundExchange objects to Instruction No. 1 to the extent it is inconsistent with the parties' Discovery Schedule, especially with respect to so-called "follow-up requests," which

should count towards the limit of 200 requests. SoundExchange further objects to the reference to an order of the Judges without a date or other identification of the Order referenced.

33. SoundExchange objects to Instruction No. 3 as not directly related to SoundExchange's written direct case, overbroad, unduly burdensome, harassing and oppressive to the extent it seeks documents from RIAA, which is not a participant in this proceeding and has not provided a witness in this proceeding. SoundExchange further objects to the instruction as overbroad, unduly burdensome, harassing and oppressive to the extent it seeks documents from the "attorneys, agents, directors, officers, employees, representatives" or anyone "or entit[y] directly or indirectly employed by or connected with SoundExchange, RIAA or such Record Company," without limitation to the extent it is overbroad, unduly burdensome and exceedingly vague and purports to impose an obligation to collect documents from an unreasonably wide array of people and entities. SoundExchange further objects to the extent Instruction No. 3 seeks information protected from discovery under any statute, regulation, agreement, protective order or privilege, including, but not limited to, the attorney-client privilege and work-product doctrine. As a general matter, where applicable and except as otherwise indicated in response to a specific request, SoundExchange will conduct a reasonable search for and produce non-privileged documents from SoundExchange and the witnesses who submitted written direct testimony on behalf of SoundExchange. To the extent SoundExchange searches for responsive documents from Warner, Sony or UMG, it agrees to do so at the corporate level where such documents are most likely to be found, and not at the level of individual labels within each company except where indicated below.

34. SoundExchange objects to Instruction No. 5's request for a privilege log. The governing statute, regulations and Discovery Schedule do not provide for the exchange of

privilege logs. Creation of a privilege log would be unreasonable and unduly burdensome within the very short discovery period provided in this proceeding.

35. SoundExchange objects to Instruction No. 7 requiring SoundExchange to the extent it purports to require SoundExchange to guess as to the meaning intended by impossibly ambiguous language and respond to an objectionable request.

36. SoundExchange objects to Instruction No. 9 as overbroad and unduly burdensome to the extent that it is not limited to time periods reasonably related to the matters at issue in this proceeding. Except as otherwise indicated in response to a specific request, SoundExchange will search for and produce documents for the time period January 1, 2011 to those most recently available at the close of discovery.

RESPONSES TO REQUESTS FOR DOCUMENTS

Document Requests Related to SoundExchange's Rate Proposal for Noncommercial Webcasters

REQUEST FOR PRODUCTION NO. 1:

Each document reflecting the consideration given, if any, by SoundExchange (including any officers, directors, Board members, or employees of SoundExchange) or any SoundExchange witness (including SoundExchange's experts), in connection with the development of SoundExchange's proposed rates and terms as are applicable to NPR/Public Radio, broadcasters affiliated with a college or university, noncommercial religious broadcasters, or any other discrete noncommercial broadcaster group regarding whether and/or how NPR/Public Radio, broadcasters affiliated with a college or university, noncommercial religious broadcasters, or any other discrete Noncommercial Broadcaster group were (or should be) considered or treated in any fashion different or separate from other Noncommercial Webcasters covered by SoundExchange's proposed rates and terms for Noncommercial Webcasters (as set forth in Section II.B of the Proposed Rates and Terms of SoundExchange, Inc., filed on October 7, 2014).

RESPONSE TO REQUEST FOR PRODUCTION NO. 1:

SoundExchange objects to this request to the extent it seeks documents not "directly related" to SoundExchange's written direct statement. SoundExchange objects to this request as overbroad, unduly burdensome, oppressive and harassing. SoundExchange further objects to this request to the extent it seeks information and documents protected from discovery

a central location in the normal course of business. SoundExchange further objects to this request to the extent that it is not limited to time periods reasonably related to the matters at issue in this proceeding. SoundExchange objects to this document request as compound and containing multiple discrete subparts, to the extent it asks SoundExchange to gather documents from numerous companies. SoundExchange further objects to this request to the extent it seeks information and documents protected from discovery by the attorney-client privilege and work-product doctrine. SoundExchange asserts all such privileges and protections and will not produce documents so protected. SoundExchange further objects to this request as directed at independent record labels for whom searching for such documents is unduly burdensome and as directed at Iconic Entertainment Group, which is not even a record company.

Without waiver of and subject to SoundExchange's general and specific objections, SoundExchange agrees to produce responsive, non-privileged documents located after a reasonable and diligent search to the extent such documents exist as follows: SoundExchange already produced documents that were relied upon in preparing SoundExchange's witnesses' written direct testimony. SoundExchange will conduct a reasonable search for additional documents in the places where such documents would most likely be found at the corporate level of the three major record companies and agrees to produce agreements authorizing NPR or Public Radio to perform sound recordings outside of the scope of the §§ 114 and 112 statutory license kept in the ordinary course of business to the extent directly related to SoundExchange's written direct testimony.

REQUEST FOR PRODUCTION NO. 7:

All documents related to the negotiation of the agreements of each witness's company (or any of its subsidiary labels or affiliates) with Digital Services offering on-demand streaming, video streaming (including but not limited to YouTube and Vevo), or non-interactive, "programmed," personalized, and/or customized streaming, and any analyses or projections of anticipated revenues or earnings with respect to such agreements – including requests for licenses and negotiations that did not result in an executed license.

RESPONSE TO REQUEST FOR PRODUCTION NO. 7:

SoundExchange objects to this request to the extent it seeks documents not "directly related" to SoundExchange's written direct statement. SoundExchange objects to this request as overbroad, unduly burdensome, oppressive and harassing. As written, the request seeks potentially hundreds of thousands of documents between witnesses' record companies and numerous digital music services, including documents related to negotiations for agreements that no witness or party has considered in connection with this proceeding, without any reasonable limitation to the issues in this proceeding. All documents related to the negotiations of agreements with Digital Services offering on-demand, video, or non-interactive streaming includes *every* document for the numerous individuals whose work includes negotiating digital licenses. SoundExchange objects to this request to the extent it purports to require an unreasonable and unduly burdensome search for documents from every label within a larger record company. Such documents are not kept at a central location in the normal course of business. SoundExchange further objects to this request to the extent it seeks information and

documents protected from discovery by the attorney-client privilege and work-product doctrine. SoundExchange asserts all such privileges and protections and will not produce documents so protected. SoundExchange further objects to this request to the extent that it is not limited to time periods reasonably related to the matters at issue in this proceeding, including time periods that pre-date the current statutory rate period. SoundExchange objects to this document request as compound and containing multiple discrete subparts, to the extent it asks SoundExchange to gather documents from numerous companies. SoundExchange objects to the phrase "all documents related to the negotiation" as not only overbroad, but ambiguous and vague. SoundExchange interprets "documents related to the negotiation of the agreements" to mean those documents exchanged with the counterparty to the agreement which includes any "analyses or projections" exchanged with the counterparty but excludes any internal analyses or documents related to the negotiation of such agreements. SoundExchange further objects to this request as directed at independent record labels for whom searching for such documents is unduly burdensome and as directed at Iconic Entertainment Group, which is not even a record company.

Without waiver of and subject to SoundExchange's general and specific objections, SoundExchange agrees to produce responsive, non-privileged documents located after a reasonable and diligent search to the extent such documents exist as follows: SoundExchange already produced documents that were relied upon in preparing SoundExchange's witnesses' written direct testimony. SoundExchange will conduct a reasonable search for additional documents related to the negotiation of agreements where such negotiations were explicitly referenced by SoundExchange witnesses and therefore "directly related" to SoundExchange's written direct statement. Specifically, SoundExchange agrees to produce non-privileged negotiating documents exchanged between the primary negotiating team for Warner Music Group and iHeartMedia, Inc. from 2011 to October 2014 as directly related to the testimony of Ron Wilcox. SoundExchange will also produce negotiating documents exchanged between lead negotiators at Universal Music Group and MySpace, Inc. from 2011 to October 2014 as well as those exchanged between lead negotiators at Universal Music Group and Slacker, Inc. from 2011 to October 2014, as directly related to the testimony of Aaron Harrison. SoundExchange will also produce negotiating documents exchanged between Mr. Van Arman and Rhapsody International located after a reasonable search.

REQUEST FOR PRODUCTION NO. 8:

For the agreements of each witness's company (or any of its subsidiary labels or affiliates) with any Digital Service offering on-demand streaming, video streaming, or custom, personalized or non-interactive streaming, all royalty statements/ statements of account from the Digital Service for each quarterly reporting period (or other regular reporting period specified by the agreement) since January 1, 2009.

RESPONSE TO REQUEST FOR PRODUCTION NO. 8:

SoundExchange objects to this request to the extent it seeks documents not "directly related" to SoundExchange's written direct statement. SoundExchange objects to this request as overbroad, unduly burdensome, oppressive and harassing. As written, the request seeks thousands of royalty statements, including those related to agreements that no witness or

and containing multiple discrete subparts, to the extent it asks SoundExchange to gather documents from numerous companies. SoundExchange further objects to this request to the extent it is ambiguous and vague. Record companies do not keep marketing and promotional plans by artist, but rather by project. SoundExchange objects to this request to the extent it purports to require an unreasonable and unduly burdensome search for documents from every label within a larger record company. Such documents are not kept at a central location in the normal course of business. SoundExchange further objects to this request as directed at independent record labels for whom searching for such documents is unduly burdensome and as directed at Iconic Entertainment Group, which is not even a record company.

Without waiver of and subject to SoundExchange's general and specific objections, SoundExchange agrees to produce responsive, non-privileged documents located after a reasonable and diligent search to the extent such documents exist as follows: SoundExchange already produced documents that were relied upon in preparing SoundExchange's witnesses' written direct testimony. SoundExchange will conduct a reasonable search for additional documents in the places where such documents would most likely be found at the corporate level of the three major record companies and with the largest subsidiary labels, and agrees to produce final marketing and/or promotional plans to the extent they exist for that record company's top grossing projects as they are kept in the ordinary course to the extent directly related to SoundExchange's written direct testimony.

REQUEST FOR PRODUCTION NO. 17:

In relation to the witnesses' various contentions that the presence or availability of statutory license(s) influences negotiations with Digital Services, or acts as a "ceiling," "constraint" or other limit on rates that can be achieved in direct licensing negotiations, all documents related to the effect of statutory rates, or the actions or reactions of other record companies, on license fees that the witnesses' companies are able to obtain in direct license negotiations with Digital Services.

RESPONSE TO REQUEST FOR PRODUCTION NO. 17:

SoundExchange objects to this request to the extent that it seeks documents that are not "directly related" to SoundExchange's written direct testimony. SoundExchange objects to this request because it is overbroad and unduly burdensome. SoundExchange objects to this request to the extent it purports to require an unreasonable and unduly burdensome search for documents from every label within a larger record company. Such documents are not kept at a central location in the normal course of business. SoundExchange further objects to the defined term Digital Services as overbroad and creating undue burden because it sweeps far too widely and potentially implicates thousands of music services, many of which are not relevant as they involve rights not comparable to the rights licensed by §§ 114 and 112 at issue in this proceeding. SoundExchange further objects to this request to the extent it is ambiguous and vague. It is unclear which "various contentions" this request references. Further, countless documents are related to the effect of the statutory rates without explicitly mentioning the statutory rates. SoundExchange further objects to the extent that "all documents related to . . . the actions or reactions of other record companies, on license fees that the witnesses' companies

are able to obtain in direct license negotiations with Digital Services" purports to see documents not in the possession, custody, or control of SoundExchange or its witnesses' companies. SoundExchange objects to this request to the extent that it is not limited to time periods reasonably related to the matters at issue in this proceeding. SoundExchange objects to this document request as compound and containing multiple discrete subparts, to the extent it asks SoundExchange to gather documents from numerous companies. SoundExchange further objects to this request as directed at independent record labels for whom searching for such documents is unduly burdensome and as directed at Iconic Entertainment Group, which is not even a record company. The agreements produced in SoundExchange's initial disclosures provide ample evidence related to how the "presence or availability of statutory license(s) influences [] negotiations with [those] Digital Services." SoundExchange already produced documents that were relied upon in preparing SoundExchange's witnesses' written direct testimony. For the aforementioned reasons, SoundExchange will not produce additional documents pursuant to this request.

REQUEST FOR PRODUCTION NO. 18:

Each document created by or on behalf of the witnesses' companies (or their subsidiary labels) concerning the effect of statutory streaming royalties on the company's investment in developing sound recordings.

RESPONSE TO REQUEST FOR PRODUCTION NO. 18:

SoundExchange objects to this request to the extent it seeks documents not "directly related" to SoundExchange's written direct statement. SoundExchange objects to this request as both duplicative and overbroad, unduly burdensome, oppressive, and harassing. SoundExchange further objects to this request to the extent it seeks information and documents protected from discovery by the attorney-client privilege and work-product doctrine. SoundExchange asserts all such privileges and protections and will not produce documents so protected. SoundExchange objects to the phrase "concerning the effect of statutory streaming royalties on the company's investment in developing sound recordings" as not only overbroad, but ambiguous and vague. This request purports to seek thousands of documents that concern statutory streaming royalties in the context of analyzing investments in developing sound recordings. SoundExchange objects to this request to the extent that it is not limited to time periods reasonably related to the matters at issue in this proceeding, including time periods that pre-date the current statutory rate period. SoundExchange objects to this document request as compound and containing multiple discrete subparts, to the extent it asks SoundExchange to gather documents from numerous companies. SoundExchange further objects to this request to the extent it purports to require an unreasonable and unduly burdensome search for documents from every label within a larger record company. Such documents are not kept at a central location in the normal course of business. SoundExchange objects to this request to the extent it purports to require an unreasonable and unduly burdensome search for documents from every label within a larger record company. Such documents are not kept at a central location in the normal course of business. SoundExchange further objects to this request as directed at independent record labels for whom searching for such documents is unduly burdensome and as directed at Iconic Entertainment Group, which is not even a record company. SoundExchange

already produced documents that were relied upon in preparing SoundExchange's witnesses' written direct testimony. For the aforementioned reasons, SoundExchange will not produce additional documents pursuant to this request.

REQUEST FOR PRODUCTION NO. 19:

All documents related to communications between the witness's company and SoundExchange, or between the witness's company and any other company represented by SoundExchange related to the negotiation of licenses for the reproduction or public performance of sound recordings, the rates and terms of the Statutory Licenses, and the applicable regulations governing the Statutory Licenses.

RESPONSE TO REQUEST FOR PRODUCTION NO. 19:

SoundExchange objects to this request to the extent it seeks documents not "directly related" to SoundExchange's written direct statement. SoundExchange objects to this request as overbroad, unduly burdensome, oppressive, and harassing. SoundExchange is charged with administering the Statutory Licenses and, as a result, has countless communications with its members, including witnesses' companies, about the license and governing regulations. The request, as written, could apply to all of SoundExchange's communications. SoundExchange further objects to this request to the extent it seeks information and documents protected from discovery by the attorney-client privilege and work-product doctrine. SoundExchange asserts all such privileges and protections and will not produce documents so protected. SoundExchange objects to this request to the extent that it is not limited to time periods reasonably related to the matters at issue in this proceeding, including time periods that pre-date the current statutory rate period. SoundExchange objects to this document request as compound and containing multiple discrete subparts, to the extent it asks SoundExchange to gather documents from numerous companies. SoundExchange objects to the request for documents between witnesses' companies and any other company relating to negotiating licenses for the reproduction or public performance of sound recordings because witnesses' companies do not communicate regarding such confidential negotiations. SoundExchange further objects to this request as directed at independent record labels for whom searching for such documents is unduly burdensome and as directed at Iconic Entertainment Group, which is not even a record company. SoundExchange already produced documents that were relied upon in preparing SoundExchange's witnesses' written direct testimony. For the aforementioned reasons, SoundExchange will not produce additional documents pursuant to this request.

REQUEST FOR PRODUCTION NO. 20:

All documents related to Sony's and Universal's new policies – as communicated to iHeartMedia in or around September and/or October 2014 – [REDACTED] as pertaining to Kooker at 4-5 (testifying about Sony's marketing and promotion of artists and songs, including "promotion, publicity, social media, live tour support, video promotion, and brand sponsorship) and at 8 (discussing revenues earned from digital streaming) and Harleston and 5, 11 (discussing Universal's investments and costs of A&R) and at 9 (discussing Universal's marketing "across all media platforms, and the

reasonable search for additional documents in the places where such documents would most likely be found and agrees to produce those documents kept in the ordinary course of business that are sufficient to show exchanges between [REDACTED]

REQUEST FOR PRODUCTION NO. 39:

For each Warner agreement with a Digital Service (including any "digital services," "digital distribution services," or digital partners" as Mr. Wilcox uses those term in his written direct testimony, e.g., at pages 4-7), documents sufficient to show Warner's valuations, if any, of the following provisions of such agreements discussed by Mr. Wilcox at pages 6-7 of his Written Direct Testimony (or the additional consideration Warner receives when such provisions are not present): (a) payment structure based on [REDACTED] (b) [REDACTED] (c) [REDACTED] (d) access to data; (e) security provisions; (f) holdback rights; (g) reporting requirements; (h) audit rights; and (i) short-term licenses.

RESPONSE TO REQUEST FOR PRODUCTION NO. 39:

SoundExchange objects to this request to the extent it seeks documents not "directly related" to SoundExchange's written direct statement. SoundExchange further objects to this request to the extent it seeks information and documents protected from discovery by the attorney-client privilege and work-product doctrine. SoundExchange asserts all such privileges and protections and will not produce documents so protected. SoundExchange objects to this request as both duplicative and overbroad, unduly burdensome, oppressive, and harassing. SoundExchange objects to this request to the extent that it is not limited to time periods reasonably related to the matters at issue in this proceeding. SoundExchange objects to this request to the extent it seeks documents not maintained in the ordinary course of business and that would require the creation of documents which do not already exist. SoundExchange objects to this request to the extent it seeks internal documents discussing the value of the consideration. The consideration received can be evaluated by looking to the final agreement which represents the consideration to which a willing buyer and seller would agree. SoundExchange has already produced numerous agreements with streaming music services that are evidence of the value of these provisions. Further, SoundExchange already produced documents that were relied upon in preparing SoundExchange's witnesses' written direct testimony. For the aforementioned reasons, SoundExchange will not produce additional documents pursuant to this request.

**Document Requests Directly Related to the
Written Witness Testimony of Aaron Harrison**

REQUEST FOR PRODUCTION NO. 40:

All new partner questionnaires as described by Mr. Harrison in paragraph 23 of his testimony.

RESPONSE TO REQUEST FOR PRODUCTION NO. 40:

SoundExchange objects to this request to the extent it seeks documents not "directly related" to SoundExchange's written direct statement. SoundExchange further objects to this request to the extent it seeks information and documents protected from discovery by the attorney-client privilege and work-product doctrine. SoundExchange asserts all such privileges and protections and will not produce documents so protected. SoundExchange objects to this request as overbroad, unduly burdensome, oppressive and harassing. These documents are not kept in a central location, it would be unduly burdensome for SoundExchange to collect *all* new partner questionnaires which would include those from services that no party has submitted as a possible benchmark for these proceedings, and SoundExchange has already produced a questionnaire. SoundExchange objects to this request to the extent that it is not limited to time periods reasonably related to the matters at issue in this proceeding. Mr. Harrison's testimony speaks in general about new partner questionnaires, not specifically about any service's particular questionnaire. SoundExchange already produced documents that were relied upon in preparing SoundExchange's witnesses' written direct testimony. For the aforementioned reasons, SoundExchange will not produce additional documents pursuant to this request.

REQUEST FOR PRODUCTION NO. 41:

For each Universal (or any Subsidiary Label) agreement with a Digital Service, all calculations of the "effective rate" paid and ARPU (as described by Mr. Harrison at pp. 8 and 17-18 of his testimony) for periods since January 1, 2009.

RESPONSE TO REQUEST FOR PRODUCTION NO. 41:

SoundExchange objects to this request to the extent it seeks documents not "directly related" to SoundExchange's written direct statement. SoundExchange further objects to this request to the extent it seeks information and documents protected from discovery by the attorney-client privilege and work-product doctrine. SoundExchange asserts all such privileges and protections and will not produce documents so protected. SoundExchange objects to this request as overbroad, unduly burdensome, oppressive and harassing. As written, the request seeks documents related to numerous digital music services, including documents that no witness or party has considered in connection with this proceeding, without any reasonable limitation to the issues in this proceeding. SoundExchange objects to this request to the extent it purports to require an unreasonable and unduly burdensome search for documents from every label within a larger record company. Such documents are not kept at a central location in the normal course of business. SoundExchange objects to the defined term Digital Services as overbroad and creating undue burden, because it sweeps far too widely and potentially implicates thousands of music services, many of which are not relevant as they involve rights not comparable to the rights licensed by §§ 114 and 112 at issue in this proceeding. SoundExchange objects to this request to the extent that it mischaracterizes Mr. Harrison's testimony. SoundExchange objects to this request to the extent that it is not limited to time periods reasonably related to the matters at issue in this proceeding, including time periods that pre-date the current statutory rate period. SoundExchange objects to this request to the extent it seeks documents not maintained in the ordinary course of business and that would require the creation of documents which do not

matters at issue in this proceeding, including time periods that pre-date the current statutory rate period. SoundExchange has already produced royalty statements relied upon by Dr. Rubinfeld in its initial disclosures.

Without waiver of and subject to SoundExchange's general and specific objections, SoundExchange agrees to produce responsive, non-privileged documents located after a reasonable and diligent search to the extent such documents exist as follows: SoundExchange already produced documents that were relied upon in preparing SoundExchange's witnesses' written direct testimony. SoundExchange agrees to produce those responsive, non-privileged documents reviewed or referred to in Dr. Rubinfeld's testimony to the extent not already produced.

REQUEST FOR PRODUCTION NO. 98:

For every agreement or prospective agreement between a Record Company and a Digital Service, including each agreement responsive to Request 96, as well as each agreement between a Record Company and a Digital Service that was proposed, considered, or negotiated, but not executed, all documents in the possession of any Record Company, SoundExchange, or Dr. Rubinfeld related to negotiation, evaluation, and (where applicable) execution of the agreement, including:

- a. all drafts of the agreement;
- b. all term sheets describing the proposed terms of the agreement;
- c. all analyses and projections of expected and actual compensation under the agreement or value provided by the agreement or specific terms thereof, both before and after the agreement was executed, whether prepared by the Record Company, the counterparty, or a third party; and
- d. all documents pertaining to the negotiation of the agreement, including all communications between the Record Company and the counterparty, communications internal to the Record Company, and communications with third parties.

RESPONSE TO REQUEST FOR PRODUCTION NO. 98:

SoundExchange objects to this request to the extent it seeks documents not "directly related" to SoundExchange's written direct statement. SoundExchange further objects to this request to the extent it seeks information and documents protected from discovery by the attorney-client privilege and work-product doctrine. SoundExchange asserts all such privileges and protections and will not produce documents so protected. SoundExchange objects to this request as entirely duplicative of Request No. 5 and overbroad, unduly burdensome, oppressive and harassing. As written, the request seeks thousands of agreements between numerous record companies and numerous digital music services, including documents that no witness or party has considered in connection with this proceeding, without any reasonable limitation to the

issues in this proceeding. SoundExchange objects to the defined term Digital Services as overbroad and creating undue burden, because it sweeps far too widely and potentially implicates thousands of music services, many of which are not relevant as they involve rights not comparable to the rights licensed by §§ 114 and 112 at issue in this proceeding. SoundExchange objects to this request to the extent that it is not limited to time periods reasonably related to the matters at issue in this proceeding, including time periods that pre-date the current statutory rate period. SoundExchange has already produced agreements relied upon by Dr. Rubinfeld in its initial disclosures. Dr. Rubinfeld did not consider any of the above mentioned documents in his analysis.

Without waiver of and subject to SoundExchange's general and specific objections, SoundExchange agrees to produce responsive, non-privileged documents located after a reasonable and diligent search to the extent such documents exist as follows: SoundExchange already produced documents that were relied upon in preparing SoundExchange's witnesses' written direct testimony. SoundExchange agrees to produce those responsive, non-privileged documents reviewed or referred to in Dr. Rubinfeld's testimony to the extent not already produced.

REQUEST FOR PRODUCTION NO. 99:

Monthly historical data for the period between 2009 and present on all royalties collected by SoundExchange from any Digital Service, including (1) total performances reported by each Digital Service, (2) total royalties paid by each Digital Service, (3) total performances attributed to each Record Company, and (4) total royalties paid to each Record Company. For the avoidance of doubt, this Request includes data on those Digital Services analyzed by Dr. Rubinfeld as well as those Dr. Rubinfeld declined to consider on the ground that they lacked a meaningful role in the U.S. market (see Rubinfeld ¶ 30), including 7Digital, Guvera, TurnTable.FM, Neurotic Media, Pasito, Arkiv Music, Instant Media Network, and Overflow.

RESPONSE TO REQUEST FOR PRODUCTION NO. 99:

SoundExchange objects to this request to the extent it seeks documents not "directly related" to SoundExchange's written direct statement. SoundExchange further objects to this request to the extent it seeks information and documents protected from discovery by the attorney-client privilege and work-product doctrine. SoundExchange asserts all such privileges and protections and will not produce documents so protected. SoundExchange objects to this request as overbroad, unduly burdensome, oppressive and harassing as many of these services do not pay royalties to SoundExchange. As written, the request seeks documents related to numerous digital music services, including documents that no witness or party has considered in connection with this proceeding, without any reasonable limitation to the issues in this proceeding. SoundExchange objects to the defined term Digital Services as overbroad and creating undue burden, because it sweeps far too widely and potentially implicates thousands of music services, many of which are not relevant as they involve rights not comparable to the rights licensed by §§ 114 and 112 at issue in this proceeding. SoundExchange objects to this request to the extent that it is not limited to time periods reasonably related to the matters at issue in this proceeding, including time periods that pre-date the current statutory rate period.

RESPONSE TO REQUEST FOR PRODUCTION NO. 145:

SoundExchange objects to this request to the extent it seeks documents not "directly related" to SoundExchange's written direct statement. SoundExchange further objects to this request to the extent it seeks information and documents protected from discovery by the attorney-client privilege and work-product doctrine. SoundExchange asserts all such privileges and protections and will not produce documents so protected. SoundExchange objects to this request as overbroad, unduly burdensome, oppressive and harassing. SoundExchange further objects to this request, to the extent it seeks documents which the parties have, by written agreement, agreed not to seek from or produce to one another. SoundExchange objects to this request to the extent that it is not limited to time periods reasonably related to the matters at issue in this proceeding. SoundExchange has already produced documents relied upon by Dr. McFadden in its initial disclosures.

Without waiver of and subject to SoundExchange's general and specific objections, SoundExchange agrees to produce responsive, non-privileged documents located after a reasonable and diligent search to the extent such documents exist as follows: SoundExchange already produced documents that were relied upon in preparing SoundExchange's witnesses' written direct testimony. SoundExchange agrees to produce those responsive, non-privileged documents reviewed or referred to in Dr. McFadden's testimony to the extent not already produced.

Respectfully submitted,

By: /s/ Anjan Choudhury

Glenn D. Pomerantz (CA Bar 112503)

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Counsel for SoundExchange, Inc.

November 7, 2014

Exhibit B

Collins, Reed

From: Ehler, Rose <Rose.Ehler@mto.com>
Sent: Wednesday, November 26, 2014 2:31 PM
To: Larson, Todd; Anjan.Choudhury@mto.com; LeMoine, Melinda
Cc: Paul M. Fakler; Jackson Toof; bjooseph@wileyrein.com; Perelman, Sabrina; Jacob Ebin; Rich, Bruce; kabin@wileyrein.com; jthorne@khhte.com; Evan T. Leo; msturm@wileyrein.com; Mark Pacella; Chris Mills; Kelly.Klaus@mto.com; glenn.pomerantz@mto.com; Olasa, Kuruvilla
Subject: RE: License agreements
Follow Up Flag: Follow up
Flag Status: Flagged

Todd,

Thank you for your proposal. We believe this request would pose an undue burden, especially as none of SoundExchange's experts reviewed negotiating documents to support its economic assessment of the case and several of the services for which you're seeking documents are not benchmarks in SoundExchange's direct case. We therefore think much of what you are requesting is not "directly related" to SoundExchange's written direct testimony. We further object to the production of internal negotiating documents as far too burdensome given the substantial volume of this request and the time and expense of conducting a privilege review. We also object to collecting additional negotiating documents, beyond those already produced, from Beggars Group and Secretly Group as both are independent record labels with limited resources and extensive discovery burdens would discourage them and similar independent labels from agreeing to participate in the CRB proceedings.

Of course, as discussed in our call, we are amenable to compromise. We'd like to offer to collect, review and produce external negotiating documents from the majors related to the following five services:

Beats
Nokia MixRadio
Rdio
Slacker
Spotify

Please let us know if you agree.

Thanks,
Rose

Rose Leda Ehler | Munger, Tolles & Olson LLP
560 Mission Street | San Francisco, CA 94105
Tel: 415.512.4071 | Rose.Ehler@mto.com | www.mto.com

*****NOTICE*****

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-----Original Message-----

From: Larson, Todd [<mailto:Todd.Larson@weil.com>]
Sent: Tuesday, November 25, 2014 3:35 PM

To: Ehler, Rose; Choudhury, Anjan; LeMoine, Melinda
Cc: Paul M. Fakler; Jackson Toof; bjoseph@wileyrein.com; Perelman, Sabrina; Jacob Ebin; Rich, Bruce;
kablin@wileyrein.com; jthorne@khhte.com; Evan T. Leo; msturm@wileyrein.com; Mark Pacella; Chris Mills
Subject: License agreements

Rose,

I'm writing to follow up on our call last week where we discussed SoundExchange's production of license agreements, reports of use, and negotiating documents related to license agreements between record companies and digital music services. On that call, we offered to propose a narrower set of agreements as to which we would request negotiating documents for your consideration. Accordingly, please let us know promptly whether SoundExchange would agree to produce negotiating documents related to agreements between the major record companies (and Beggars Group and Secretly Group to the extent they exist) and the following services:

Beats
iTunes Radio (incl. iMatch/iCloud)
MySpace
Nokia MixRadio
Rdio
Slacker
Spotify
Turntable.fm
Vevo
YouTube

To the extent not covered in the list above, we would also seek negotiating documents related to any services Mr. Harrison is referring to in his discussion of negotiations at paragraphs 19, 20, and 23 of his testimony. Finally, to be clear, our request includes not just documents that pass between the negotiating parties, but also documents internal to the record companies (e.g., deliberations, analyses, and other discussions related to the negotiations).

This request is made on behalf of Pandora, Sirius XM, and NAB.

Thank You.

The information contained in this email message is intended only for use of the individual or entity named above. If the reader of this message is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by email, postmaster@weil.com, and destroy the original message. Thank you.

Exhibit C

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, D.C.

In re

DETERMINATION OF ROYALTY
RATES AND TERMS FOR
EPHEMERAL RECORDING AND
DIGITAL PERFORMANCE OF SOUND
RECORDINGS (*WEB IV*)

)
)
)
) DOCKET NO. 14-CRB-0001-WR
) (2016-2020)
)
)
)

**SOUNDEXCHANGE'S FIRST SET OF REQUESTS FOR PRODUCTION OF
DOCUMENTS TO PANDORA MEDIA, INC.**

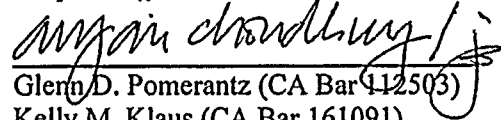
Pursuant to 17 U.S.C. § 803(b)(6)(C)(v) and 37 C.F.R. § 351.5(b)(1), SoundExchange, Inc. serves this First Set of Requests for Production of Documents on Pandora Media, Inc. These Requests are continuing in nature and may require supplementation.

DEFINITIONS AND INSTRUCTIONS

1. The present tense shall be construed to include the past and future tenses and the past and future tenses shall be construed to include the present tense as required by the context to elicit all information discoverable within the broadest scope of these document requests.
2. The singular shall be construed to include the plural and the plural shall be construed to include the singular as required by the context to elicit all information discoverable within the broadest scope of these document requests.
3. "And" and "or" have both conjunctive and disjunctive meanings as required by the context to elicit all information discoverable within the broadest scope of these document requests.
4. "Any" and "all" shall mean "each and every."

11. All documents that concern or relate to the number or percentage of Pandora users that also use on-demand services, as described on page 8 of Simon Fleming Wood's written direct testimony, including the number or percentage of Pandora users that use the paid versions of such services and the number or percentage of users that use each specific service.
12. All documents that concern, relate to, or comprise statements made to or communications with investors or analysts, including presentations, roadshows, and transcripts of earnings calls.
13. All documents that concern or relate to Pandora's efforts to create a new market for Internet radio advertisements, as described on page 3 of Michael Herring's testimony.
14. All documents that concern or relate to any estimates regarding the effect of higher or lower royalty rates on Pandora's growth rate, including, for example, the estimate on page 3 of Michael Herring's testimony that Pandora would have at best grown to half its current size if subject to the *Webcasting II* or *Webcasting III* rates.
15. All documents that concern or relate to directly licensed webcasting agreements between Pandora and any record label, including but not limited to the Pandora-Merlin agreement, including the full text of the agreement and any attachments or amendments, and the full text of any previous agreements between the parties.
16. All documents that concern or relate to the "Steering Experiments" or other similar experiments, including the 2013 experiments performed by Pandora and described at page 2, footnote 1, of Stephan McBride's testimony. This request is inclusive of all documents relating to the design and implementation of those experiments as well as the results.
17. All documents that concern or relate to the Music Sales Experiments, or other similar experiments or "business inquiries" performed by Pandora and described at page 10 of

Respectfully submitted,



Glenn D. Pomerantz (CA Bar 112503)

Kelly M. Klaus (CA Bar 161091)

Anjan Choudhury (DC Bar 497271)

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Kelly.Klaus@mto.com

Anjan.Choudhury@mto.com

Counsel for SoundExchange, Inc.

Exhibit D

Before the
UNITED STATES COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In The Matter Of:

Docket No. 2005-1 CRB DTRA

Digital Performance Rights in Sound
Recordings and Ephemeral Recordings

HEARING REQUESTED

DIGITAL MEDIA ASSOCIATION AND ITS MEMBER COMPANIES,
THE BROADCASTERS AND NPR'S MOTION TO COMPEL
SOUNDEXCHANGE TO PRODUCE NEGOTIATING DOCUMENTS
DIRECTLY RELATED TO ITS DIRECT STATEMENT

INTRODUCTION

The Digital Media Association and its member companies, including Copyright Royalty Board ("CRB" or "Board") participants America Online, Inc. and Yahoo! Inc., (collectively, "DiMA"), along with Bonneville International Corp., Clear Channel Communications, Inc., Infinity Broadcasting Corp., The National Religious Broadcasters Music License Committee, The National Religious Broadcasters Noncommercial Music License Committee, and Susquehanna Radio Corp. (collectively, "Broadcasters") and National Public Radio ("NPR"), (collectively, "Movants"), move to compel production of negotiating documents for the agreements found throughout SoundExchange's Direct Statement. Specifically, Movants seek the following categories of negotiating documents:

1. Negotiating documents directly related to the agreements reviewed and or relied upon by SX expert Pelcovits;

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2. Negotiating documents directly related to the agreements referred to and or discussed by the record label witnesses;
3. Agreements and surrounding negotiating documents directly related to any other agreement between the record labels and any service with a business model identified or described by the record label witnesses; and
4. Negotiating documents related to a 17 U.S.C. §§ 112 or 114 statutory license ("Statutory License"), regardless of whether the negotiations resulted in an agreement.

These documents are relevant to this proceeding and constitute evidence that the prior Copyright Arbitration Royalty Panel ("CARP") proceeding found vital to that proceeding, and that it compelled SX/the labels' to produce. See Order of the CARP in Docket No. 2009, CARP DTRA 1&2, Paragraph II A (1) (Aug. 14, 2001) (hereinafter, "August 14, 2001 Order"). As such, scrutiny of the requested documents is vitally important not only to Movants' but the CRB's assessment of SoundExchange's benchmarks, and the Board's resolution of this rate adjustment proceeding would be substantially impaired if SoundExchange is allowed to retain this undisclosed core evidence.

Notwithstanding the relevance of these documents and this precedent, SoundExchange refuses to produce the negotiating documents giving essential context to those agreements that it has placed at issue in the instant proceeding. SoundExchange must be compelled to produce these very relevant negotiating documents.

I. Documents Movants Seek To Compel

A. The Documents Requested By Movants

Movants requested the documents at issue in the instant motion. It sought documents directly related to any discussions, policies, positions, or practices of SoundExchange (including, obviously, its committees and boards) or the major labels about the development of and strategy for negotiating rates and terms for (a) the Statutory

Licenses or (b) voluntary license agreements for Internet-related performance licenses entered into by one or more record labels. See, e.g., Movants' First Request to SoundExchange for Production of Documents,¹ General Request 9; Brynjolfsson Request 19; Pelcovits Requests 2, 6, 9, 12, 13, 15, 22, 23, 26, 28, 30, 31, 36, 41, and 61; and Record Company Requests 54, 55, 56, 58, 59, 62, 68, 69, 77, 81-83, 85, 86, 89, 91, 94, 95.

B. The Position of SoundExchange on the Requests

SoundExchange has flatly refused to produce "all documents of any kind 'concerning' such negotiations or agreements, such as all email or internal memoranda." See SoundExchange's Responses and Objections to Movants' First Request for Documents,² General Objection 6.

SoundExchange objects to production on boilerplate assertions such as vagueness and overbreadth and on the unsupportable assertion that the negotiating documents do not directly relate to any of the witnesses' testimony.³ See generally App. Exh. "B", General Requests Applicable to All Witnesses 9; Brynjolfsson Request 19; Pelcovits Requests 2, 6, 9, 12, 13, 15, 22, 23, 26, 28, 30, 31, 36, 41, and 61; and Record Company Requests 49, 54, 55, 56, 58, 59, 62, 68, 69, 77, 81-83, 85, 86, 89, 91, 94, 95.

¹ Movants' First Request to SoundExchange for Production of Documents is set forth in Exhibit A to the Appendix attached to this motion for reference to all of Movants' document requests cited herein.

² SoundExchange's Responses and Objections to Movants' First Request for Documents is set forth in Exhibit B to the Appendix attached to this motion for reference to all of SoundExchange's responses and objections cited herein.

³ SoundExchange also objects to Movants' requests to the extent that they seek documents protected from discovery under the attorney-client privilege and work-product immunity doctrine. However, Movants currently only seek production of non-privileged documents.

SoundExchange has produced some negotiation documents, but its production remains wholly deficient. Although SoundExchange promised to produce "negotiation files (if any)," related to digital distribution agreements specifically discussed in SoundExchange's written direct statement, SoundExchange has, in actuality, produced relatively few documents. Furthermore, these documents – mainly email – do not disclose, for every license proffered by SoundExchange, the economic, competitive, programming and other circumstances which caused particular agreements to be made.

C. Movants' Requested Relief

Movants recognize that this motion is complex because of the number of agreements it addresses and the number of requests called for production. To simplify the motion, Movants offer the following: first, Movants suggest that a hearing before the Board may be the best way to resolve these issues, perhaps even before another round of briefing; and second, Movants have distilled its multiple requests to four categories of documents. So, Movants respectfully request the Board to compel SoundExchange to produce the following categories of negotiation documents (including internal memoranda and e-mails not previously produced):

1. Negotiating documents related to the agreements reviewed and or relied upon by Pelcovits;
2. Negotiating documents related to the agreements referred to and or discussed by the record label witnesses in their direct testimony;
3. Negotiating documents directly related to any other agreement between the record labels and any service with a business model identified or described by the record label witnesses; and
4. Negotiating documents related to a 17 U.S.C. §§ 112 or 114 statutory license ("Statutory License"), regardless of whether the negotiations resulted in an agreement.

For purposes of the instant motion, Movants are limiting the term "Negotiating Documents" to:

1. any document or communication "reasonably related" to SoundExchange's negotiation of its license agreements, including any discussions, policies, positions, or practices of SoundExchange, the SoundExchange Negotiating Committee, or any other committee or subgroup of SoundExchange, including, without limitation, the Board of Directors, or among SoundExchange's members concerning the development of and strategy for negotiating rates and terms for (a) the Statutory Licenses or (b) voluntary license agreements between the record labels and any service with the business models described in SoundExchange's written testimony including, but not limited to, the strategy for negotiating the agreements upon which SoundExchange has relied in its written direct statement to support its rate proposal;

or

2. any document or communication "reasonably related" to the negotiation of the agreements or contemplated agreements described in items (1)-(4) above.

D. Request for An Alternative Order

If responsive documents are not produced, Movants request that the Board make clear that SoundExchange will not be able to rely on, refer to, or base testimony on any of the agreements for which it failed to produce the requested documents.

II. Governing Legal Standard

The discovery standard governing this proceeding authorizes a participant to request non-privileged documents that directly relate to the direct statement of an opposing participant. See 17 U.S.C. § 803(b)(6)(v); 37 C.F.R. § 351.5(b). In the event a dispute arises between the participants in the production of such documents, the Board may resolve the dispute upon a motion to compel production. "The motion must show how the disputed document or documents would actually be relevant to the moving party's case and that the information sought is not readily available to the moving participant in a form or format that

would be substantially less burdensome to produce.” Id. Additionally, “the motion must include a statement that the parties had conferred and were unable to resolve the matter.”⁴

Furthermore, the statute authorizes a participant to request of an opposing participant or witness other relevant information and materials – even if such information and materials may not directly relate to the Direct Statement. Either upon a written motion or a request on the record, the participant may seek any relevant information and materials upon a showing that “absent the discovery sought, the Copyright Royalty Judges’ resolution of the proceeding would be substantially impaired.” See 17 U.S.C. § 803(b)(6)(vi).

Relevant factors to the “substantial impairment” analysis include:

1. “whether the burden or expense of producing the requested information or materials outweighs the likely benefit, taking into account the needs and resources of the participants, the importance of the issues at stake, and the probative value of the requested information or materials in resolving such issues”;
2. “whether the requested information would be unreasonably cumulative or duplicative, or are obtainable from another source that is more convenient, less burdensome, or less expensive”; and

⁴ Movants and SoundExchange discussed their respective document production issues during a telephonic meet and confer on February 9, 2006. SoundExchange persisted in its refusal to produce the negotiating documents described herein. On February 22, 2006, counsel for Movants memorialized its position in a final letter asking for a response no later than 3:00 pm of February 27, 2006. See Exhibit D attached to the Appendix of this motion. As of March 3, 2006, SoundExchange had not produced the requested materials. In addition, on March 3, 2006, well after the drafting of this motion was underway, counsel for SoundExchange responded to Movants’ letter requesting SoundExchange’s position on the production of negotiation documents. Pursuant to this letter, SoundExchange continues to refuse to produce internal negotiation documents. In addition, this letter suggests that an unquantified reservoir of additional and responsive license agreements cannot be produced without a court order. See SoundExchange March 3, 2006 letter to counsel for DiMA (attached to the Appendix of this motion as Exhibit C). To the extent that this motion could not address these additional license agreements, they are herein incorporated. Movants reserve its right to address this issue in greater detail in subsequent briefing. Accordingly, counsel for Movants certify that it has made a good faith effort to meet and confer prior to filing the instant Motion.

3. “whether the participant seeking discovery has had ample opportunity by discovery in the proceeding or by other means to obtain the information sought.”

17 U.S.C. § 803(b)(6)(vi)(I).

III. Movants Meet the Legal Requirements To Compel the Production.

A. The Requested Documents Are Relevant to Movants’ Cases.

1. **The Negotiating Documents to the 40 Agreements Reviewed by Pelcovits to Establish His Benchmarks**

In establishing the benchmark agreements on which SoundExchange rests its rate proposal, Pelcovits states that he “looked at approximately 40 contracts from the four major music studios that were executed between 2000 and 2005, covering uses of sound recordings during the period 2000 through 2006.” Testimony of Pelcovits at 22.

Pelcovits neatly summarizes only 17 of these contracts – virtually all of which relate to decidedly different activities to non-interactive webcasting, such as on-demand/interactive streaming, downloading, etc. – in Table 5.1: *Differences Between Market Licenses and Statutory License*. Id. at 23-24. Pelcovits then details the approach to the market and the objectives and strategies used by the record labels in negotiation of these so-called benchmark agreements, and he also discusses whether and how these alleged benchmark agreements compare to the willing buyer and willing seller standard in the statutory marketplace at issue. Pelcovits at 24, 28-46.

A critical component of Movants’ cases before the Board will be to address evidence casting doubt on the comparability and usefulness – in this case involving DMCA – compliant, non-interactive webcasting of SoundExchange’s proffered agreements covering wholly different functionalities. Indeed, the prior CARP expressly found in the last section

114 webcasting proceeding that negotiating documents relating to proffered benchmark agreements were not only discoverable, but “necessary to properly assess the parties’ proposed rate methodologies and ‘benchmarks.’” See August 14, 2001 Order, Paragraph II A (1).

It is impossible to overstate the significance that those negotiating documents played in the final decision of the CARP in the prior proceeding. The negotiating materials provided the CARP with necessary context and powerful insight into the handful of agreements that representatives of the record labels had proffered as benchmark agreements for setting the statutory rate for literally hundreds of services relying upon the Statutory Licenses. Ultimately, because of what was learned largely from those negotiating documents, the arbitrators rejected 25 of the 26 license agreements proffered by RIAA/SX.

Similarly, without the negotiating documents subject to the instant motion, Movants cannot assess the negotiation and performance of the purported benchmark agreements upon which SoundExchange now relies. For example, the executed agreements alone do not disclose the surrounding context underlying those agreements or the economic, competitive and programming circumstances that caused the allegedly “willing seller” to license, and the allegedly “willing buyer” to accept, the rates and terms set forth in the benchmark agreements. Access to the requested negotiation documents for agreements reviewed by Dr. Pelcovits is no less necessary herein than such materials were in the prior proceeding.

2. **Negotiating Documents to Agreements Raised by the Record Label Witnesses**

(a) *Agreements Proffered As Proper Benchmarks*

Record label witnesses have testified at great length about the licenses negotiated by them for essentially interactive, non-statutory functionalities, which they proffer as an allegedly appropriate benchmark for the license rates and terms at issue. A few examples of such testimony taken from SoundExchange's Direct Statement include: Testimony of Stephen Bryan at 10 ("If I were able to negotiate a DMCA-compliant agreement in the free market, I would start with the existing rates in other deals."); Testimony of Ken Parks at 8 ("The decision makers in this arbitration should look to [EMI's recent digital deals] when establishing the rates and terms that will apply over the next five years."); Testimony of Mark Eisenberg at 11, 14 (citing the principal economic terms in "representative" non-statutory agreements for the digital distribution of SONY BMG products as "quite instructive in gauging the value of [SONY BMG's] music in the open marketplace" and arguing that "the marketplace precedents in the mobile space must be given significant weight in assessing the fair market value of music content within the context of this CRB proceeding"); Testimony of Lawrence Kenswil at 7 ("There are many ways in which the current statutory license for noninteractive webcasting fails to reflect the agreements that UMG would negotiate in the free market if it were free to do so.").

It is instructive that the prior CARP rejected precisely these types of agreements—covering fundamentally different offerings than non-interactive webcasting—for reasons just as applicable in the instant proceedings. See Determination of the Copyright Arbitration Royalty Panel in Docket No. 2000-9 CRB DTRA 1&2. Surely Movants are entitled to the surrounding negotiation materials instructive of the context in

which these agreements were negotiated, so that the CRB can have a full record upon which to evaluate the proffered benchmark agreements.

That is especially the case where, based on the limited production made so far, there is every reason to believe that the labels once again have sought – when entering into voluntary deals for non-statutory licenses – to manufacture precedents for the very purpose of utilizing them in this proceeding.⁵ A June 5, 2003 memo from Sony Music produced by SoundExchange, entitled “Licensing Strategy For Commercial Online Exploitation of [Sony Music] Content,” which was created upon a management change for the purpose of giving senior management “a ‘helicopter view’ of [Sony Music]’s licensing strategy for commercial online exploitations of our catalog . . .,” goes on to list, as one of the explicitly enumerated “factors” pertinent to pricing: “When negotiating the rates and terms” for such licensing, “[t]he desire to establish good precedents for the online distribution of recorded music . . . which can be valuable in future Sony deals and rate setting proceedings for compulsory licenses.” (Emphasis added.)

It is interesting that, although most of the other factors specifically enumerated in this document are set forth in the written testimony of Sony’s Mark Eisenberg, this particular information did not find its way into Mr. Eisenberg’s written testimony. Surely, Movant ought to be entitled to review the contextual documents in circumstances where the creation of precedent for this case was a recognized goal of the labels.

⁵ Precisely this kind of conduct was viewed by the panel in the prior CARP as reason to be skeptical of resultant agreements offered as benchmarks. See Determination of the Copyright Royalty Arbitration Panel in Docket CARP DTRA 1&2 (Feb. 20, 2002).

b. *Agreements Proffered for the Purpose of Setting Forth the Many Economic, Competitive and Programming Factors Affecting the Negotiation of Rates and Terms between a "Willing Buyer" and "Willing Seller"*

The record label witnesses make specific bold claims with respect to the economic, competitive and programming circumstances and considerations at that produced these non-statutory agreements (i.e., those factors that affect the rates and terms of an agreement negotiated between the putative "willing buyer" and "willing seller"). Movants cannot properly evaluate any of these claims without information that discloses the operation of these circumstances in the negotiation and execution of the non-statutory licenses relied on by SoundExchange. The documents requested by Movants will disclose precisely these operations. And SoundExchange knows this.

For this reason, its witnesses make repeated assertions concerning the operation of these factors in the negotiations underlying the alleged benchmark agreements. For instance, Ken Parks, Senior Vice President, Strategy and Business Development at EMI Music, contends that, "[w]hen negotiating with those who seek to use our sound recordings, EMI seeks compensation that ensures a fair return on the content we provide . . . [i]n negotiation with any digital music service, EMI considers the service in the context of EMI's overall business." Testimony of Ken Parks at 2-3. More specifically, Mr. Parks explains that:

In any negotiation with a webcaster for a noninteractive license, sharing on an equal basis would be the starting point. EMI would make adjustments based on different functionality and would consider the possible substitution by the service for other EMI revenue streams. In such a negotiation, EMI would seek compensation similar in structure to that which we obtain in virtually every other area in the current market.

Testimony of Ken Parks at 5. Further, Mr. Parks points to EMI's actual negotiations as demonstrative of the "kinds of negotiations that might occur in the market for audio streaming, but for the artificially depressing effects of the current statutory license rates." Id. at 15; see also id. at 8, 14. Mr. Parks also makes clear in his written testimony that, "[t]he custom radio agreements (as well as many of EMI's other agreements) also illustrate, among other things, EMI's view of the wireless industry." Id. at 10.

Similarly, Stephen Bryan, Vice President of Strategic Planning and Business Development at Warner Music Group, explains, "[i]f WMG were to negotiate deals for streaming its sound recordings in the wireless market, it would approach such negotiations in the same way that it does in other contexts where sound recordings are distributed over wireless networks." Testimony of Stephen Bryan at 22. Mr. Bryan's testimony makes repeated assertions about the substance of WMG's negotiations, explaining that "WMG negotiates holdback rights as part of our agreements with new media companies" (id. at 9) and points out the various and sundry considerations at work for WMG when negotiating license agreements. Id. at 13. Universal Music Group's eLab President, Lawrence Kenswil, proffers similar testimony to establish UMG's approach to the marketplace. See Testimony of Lawrence Kenswil at 11 ("A licensee seeking a deal of longer than three years would have to agree to much higher payments, or performance-based escalations, in the later years of the contract before UMG would consider a license."); id. at 19 (even considering the promotional values of clip samples, "UMG nonetheless negotiates and receives compensation for these sound recording clips.").

SONY BMG's Senior Vice President, Business and Legal Affairs, Mark Eisenberg makes frequent reference to the factors SONY BMG uses during its license

negotiations and the critical components of the agreements negotiated. See Testimony of Mark Eisenberg at 7-8 (setting out a laundry list of SONY BMG's factors and considerations in "deciding whether to make our catalog available for distribution in a particular circumstance" – other than the desire to manufacture precedent for rate-setting cases, as discussed above); id. at 9 (citing competition with pirated versions of the same content and "anytime, anywhere" access through portable devices as "two key factors [that] have played a crucial role in shaping the economic terms for [SONY BMG's] potential digital distribution opportunities"); id. at 15 ("a key consideration in determining appropriate financial terms for the online exploitation of SONY BMG's catalog is a case-by-case evaluation of the extent to which the effect of the service is 'substitutional' . . . SONY BMG's main goal . . . is to avoid the 'commoditization' of SONY BMG's content on a 'per exploitation' or 'micropayment' level . . ."); id. at 16 (contending that the more substitutional the functionality, the greater the level (and certainty) of remuneration SONY BMG must receive). In addition, Mr. Eisenberg makes repeated contentions about what is "the heart of the negotiations with a prospective licensee" and testifies about what SONY BMG would or would not agree to in such negotiations. Id. at 12-14.

In light of the record label witnesses' repeated invocation of the licensing negotiations and agreements from non-statutory markets, and the central role these agreements play in SX's formulation of benchmarks for its proposed royalty rate in the statutory market, SoundExchange inexplicably objects to Movants' request for the documents directly related to these negotiations and surrounding context. See supra Part I B. Without these documents, the record label witnesses' claims and assertions cannot be

scrutinized, and their relevance to the statutory market cannot be measured. Either these materials should be produced or SX should be precluded from reliance on these materials.

3. Negotiating Documents With Respect to Any Other Agreements between the Record Labels and Any Service with a Similar Business Model to Agreements Identified by the Record Label Witnesses

Also directly relevant to Movants' ability to rebut SX's case are the other agreements between the record labels and any licensee offering an identical or similar service as those licensees that are party to agreements relied upon or discussed by Dr. Pelcovits or the record label witnesses in SoundExchange's Direct Statement, as well as the surrounding negotiating documents related to those agreements. Specifically, these materials provide the only effective means of determining whether SoundExchange and its label witnesses have "cherry picked" the universe of agreements and proffered evidence only of those with terms most favorable to them. It would be fundamentally unfair to permit SoundExchange to rely on a small subset of handpicked agreements with a small subset of services as alleged benchmarks while denying Movants the opportunity properly to evaluate them against the universe of other agreements covering the same types of services.

4. Documents Related to Successful and Unsuccessful Statutory License Negotiations

A particularly important and relevant category of requested information consists of documents relating to negotiations for Statutory Licenses, regardless of whether those negotiations ultimately resulted in an executed agreement. SoundExchange claims that the license agreements it has proffered should serve as the benchmark for setting rates and terms for the Statutory Licenses at issue in this proceeding. Yet not a single one of those agreements relates to the licensing of the statutory digital public performance and

ephemeral recording rights at issue here. Instead, the so-called benchmark agreements relate to very different types of rights and/or services.

If SoundExchange has entered, or attempted to enter, into Statutory Licenses, it goes without saying that those licenses or offered licenses would be far more probative of the CRB's rate-setting inquiry than agreements licensing different, non-statutory rights, all other things being equal. Similarly, Movants are entitled to probe: where SX's proposal in this case "came from;" what factors, if any, were considered by SX's negotiating committee charged with licensing webcasters, etc. Yet SX has objected broadly to producing such materials.

With respect to all such types of materials, Movants should be entitled to all non-privileged materials in SX's possession, irrespective of whether the negotiations actually led to an executed agreement. Whether the agreements were consummated or not, those negotiations could shed important light on the economic, competitive, and programming circumstances surrounding the parties' licensing considerations.

B. The Requested Documents Are Not Readily Available to Movants in a Form or Format That Would Be Substantially Less Burdensome for SoundExchange To Produce.

Not only are the requested documents not readily available to Movants in a form or format that would be substantially less burdensome for SoundExchange to produce, the requested negotiation documents are not available at all to Movants unless and until SoundExchange is required to produce them. The documents that will disclose the motives and economic, competitive and programming circumstances that caused the labels to negotiate and execute the benchmark licenses reside in SoundExchange's and its associated

labels' files and electronic storage facilities. SoundExchange is the party with the best knowledge of the location and existence of the requested documents, and, moreover, is the party with access to and control over these documents.

IV. Prior CARP Orders Support the Motion to Compel

In this case, there is an even more compelling reason for granting Movants' motion beyond the simple fact that the requested documents are properly producible under the general discovery standards in place here: The CARP in the previous rate-setting proceeding for the Statutory Licenses at issue here ordered RIAA, the agent of the same label witnesses participating in this proceeding through SoundExchange, to produce the very same types of negotiating documents that Movants seek in the present motion. After RIAA had repeatedly refused to produce negotiation documents related to the twenty-six agreements RIAA proffered as proposed benchmarks and webcasters and broadcasters moved to compel discovery, the CARP held that the requested negotiation documents were "necessary to properly assess [RIAA's] proposed rate methodologies and 'benchmarks'" and ordered RIAA to produce the documents See Order, Docket No. 2000-9 CRB DTRA 1&2 at 15 (June 22, 2001); August 14, 2001 Order at 4. These documents included all documents exchanged between Steven Marks and the RIAA Webcasting Negotiating Committee "reasonably related to the 26 license agreements between RIAA and webcasters" and "documents exchanged with members of the Committee or designees/agents of said members" – in other words, the very same internal documents whose production SoundExchange resists in the current proceeding. Id. Representatives of the record labels were further ordered to produce "[a]ll documents reasonably related to any change in the status of the 26 agreements including their renewal, termination, or rescission or the revision

of rates or terms contained therein.” Id. Significantly, the CARP reached this decision even though the discovery standard governing that proceeding was narrower than the discovery standard in place here. Compare 37 C.F.R. § 251.45(c)(1) (CARP standard: “nonprivileged underlying documents related to the written exhibits and testimony”) with 17 U.S.C. § 803(b)(6)(v) (CRB standard: “nonprivileged documents directly related to the written direct statement”) and id. § 803(b)(6)(vi)(I) (CRB standard: “other relevant information and materials if, absent the discovery sought, the Copyright Royalty Judges’ resolution of the proceeding would be substantially impaired”).

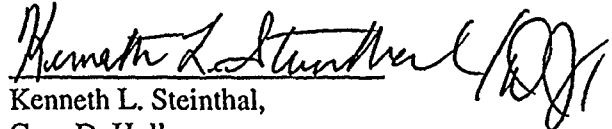
In this case, the requested documents are directly related to SoundExchange’s written direct statement and relevant to Movants’ cases, as shown above. Moreover, the CARP’s prior decision makes crystal clear that absent the discovery sought, the CRB’s resolution of this proceeding “would be substantially impaired” because it would not be able to “properly assess” SoundExchange’s proposed benchmark agreements in context. Accordingly, on the basis of both the CARP’s prior discovery order and the general discovery standards governing this proceeding, Movants’ motion to compel should be granted.

CONCLUSION

As shown above, SoundExchange considers the licensing negotiations and agreements to be the best benchmark for the rates and terms that a willing buyer and a willing seller would negotiate for the licenses at issue in this proceeding. Movants must have access to documents that will enable it to evaluate SoundExchange’s assertion that the rates and terms contained in the benchmark agreements are the rates and terms that an

allegedly willing buyer would accept for the rights at issue. In the alternative, Movants request that the Board make clear that SoundExchange will not be able to rely on, refer to, or base testimony on any of the agreements supported by any document that it fails to produce pursuant to any order entered by the Board.

March 6, 2006


Kenneth L. Steinthal,

Greg D. Hull

Weil, Gotshal & Manges

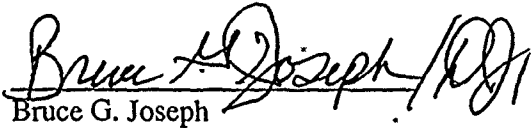
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CERTIFICATE OF SERVICE

I, David J. Taylor, hereby certify that a single copy of the enclosed
submission of Motion To Compel has been served this 6th day of March 2006 in accordance
with the Protective Order in place in Docket No. 2005-1 CRB DTRA.

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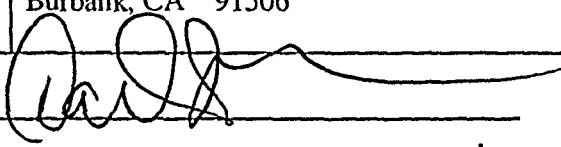


Exhibit E

Before the
COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of)
)
)

ADJUSTMENT OF RATES AND TERMS)
FOR PREEXISTING SUBSCRIPTION)
SERVICES AND SATELLITE DIGITAL)
AUDIO RADIO SERVICES)

Docket No. 2006-1 CRB DSTRA

**MOTION TO COMPEL SOUNDEXCHANGE TO PRODUCE LABEL LICENSE
AGREEMENTS AND RELATED NEGOTIATION DOCUMENTS, SUBMITTED BY XM
SATELLITE RADIO INC., SIRIUS SATELLITE RADIO INC., AND MUSIC CHOICE**

INTRODUCTION

XM Satellite Radio, Sirius Satellite Radio, and Music Choice (collectively, “Movants”) move to compel production of label license agreements and documents reflecting negotiations of certain agreements reviewed by experts, as such documents are directly related to assertions in SoundExchange, Inc.’s (“SoundExchange”) Direct Statement and are necessary to the Copyright Royalty Judges’ just resolution of this proceeding. Despite timely requests for these documents, SoundExchange has failed to produce them. Specifically, Movants seek production of the following categories of documents directly related to and put in issue in SoundExchange’s Direct Statement:

1. All digital distribution agreements between the record labels and any licensee relied upon, discussed or reviewed by Drs. Pelcovits and Ordovery, and related Negotiating Documents¹;

¹ For purposes of this Motion, “Negotiating Documents” means: (1) any document or communication “reasonably related” to any record label’s negotiation of its license agreements, including any discussions, policies, positions, or practices of any record label, the Negotiating

2. All digital distribution agreements between the record labels and any licensee relied upon, discussed or reviewed by the record label witnesses who submitted testimony in support of SoundExchange's Written Direct Statement;
3. All digital distribution agreements since 2002 between major record labels and any licensee offering an identical or similar service to those licensees that are party to the agreements reviewed, relied upon or discussed by Drs. Pelcovits or Ordovery or the record label witnesses who submitted testimony in support of SoundExchange's Direct Statement, regardless of whether the experts or label witnesses relied on or reviewed the agreements;
4. All digital distribution agreements since 2002, to the extent not otherwise produced in categories 1 through 3, between a representative sample of both major and independent record labels and each of the following: (i) DMX, (ii) Muzak, (iii) subscription on-demand music services (both portable and non-portable), (iv) "customized radio" (meaning non-DMCA compliant webcasting or other digital audio transmissions, whether offered on a subscription or as supported basis), (v) digital jukeboxes, (vi) on-demand video streaming services, (vii) pre-programmed video streaming services; and (viii) mobile or wireless subscription or ad-supported digital radio or webcasting.

Movants seek to compel SoundExchange's production of licensing agreements for the digital distribution of sound recordings and documents reflecting negotiations of agreements reviewed by SoundExchange's experts, as they are "directly related" to SoundExchange's Direct Statement. These documents are essential to permit Movants' assessment of the rates proposed in SoundExchange's Direct Statement, and the documents are therefore discoverable pursuant to 37 C.F.R. § 351.5(b). Precedent from the recently concluded webcasting proceeding in Docket No. 2005-1 CRB DTRA ("Webcaster II") supports production of the requested licensing agreements and documents reflecting the negotiations of those agreements. In that proceeding,

Committee of any label, or any other committee or subgroup of any record label, including, without limitation, the Board of Directors, concerning the development of and strategy for negotiating rates and terms for (a) the Statutory Licenses or (b) voluntary license agreements between the record labels and any service with the business models described in SoundExchange's written testimony including, but not limited to, the strategy for negotiating the agreements upon which SoundExchange has relied in its written direct statement to support its rate proposal; or (2) any document or communication "reasonably related" to the negotiation of the agreements relied upon, discussed or reviewed by Drs. Pelcovits and Ordovery.

the Copyright Royalty Judges (the "Judges") ordered SoundExchange to produce agreements and Negotiating Documents similar to those that Movants seek here.

The requested documents are also highly relevant to the Judges' assessment of SoundExchange's proffered rate, and the Judges' resolution in this rate adjustment proceeding would be substantially impaired if SoundExchange does not produce these documents. Although these documents are "directly related" to SoundExchange's Direct Statement, and clear precedent exists supporting their production, SoundExchange has refused to produce them. The Judges should therefore order SoundExchange to produce the requested documents.

Pursuant to 37 C.F.R. § 351.1(b)(1), Movants certify that the parties have met and conferred on these issues in a good faith effort to resolve the discovery disputes raised in this Motion, including a conference call on April 16, 2007 and subsequent written correspondence. The parties have been unable to reach agreement, necessitating the involvement of the Judges to resolve this discovery dispute.

I. The Governing Standard Authorizes Discovery of Relevant Documents That (A) Are Directly Related to SoundExchange's Case or (B) Without Their Production, the Judges' Resolution of this Proceeding Would be Substantially Impaired.

The discovery standard governing this proceeding authorizes a participant to request non-privileged documents that directly relate to the direct statement of an opposing participant. See 17 U.S.C. § 803(b)(6)(C)(v); 37 C.F.R. § 351.5(b). In the event a dispute arises between the participants in the production of such documents, the Judges may resolve the dispute upon a motion to compel production. Id.

The statute also authorizes a participant to request of an opposing participant or witness other relevant information and materials – even if such information and materials may not directly relate to the Direct Statement. Either upon a written motion or a request on the

record, the participant may seek any relevant information and materials upon a showing that “absent the discovery sought, the Copyright Royalty Judges’ resolution of the proceeding would be substantially impaired.” See 17 U.S.C. § 803(b)(6)(C)(vi); 37 C.F.R. § 351.5 (c). In determining whether such discovery motions will be granted, the Judges may consider the following factors:

1. “whether the burden or expense of producing the requested information or materials outweighs the likely benefit, taking into account the needs and resources of the participants, the importance of the issues at stake, and the probative value of the requested information or materials in resolving such issues”;
2. “whether the requested information would be unreasonably cumulative or duplicative, or are obtainable from another source that is more convenient, less burdensome, or less expensive”; and
3. “whether the participant seeking discovery has had ample opportunity by discovery in the proceeding or by other means to obtain the information sought.”

17 U.S.C. § 803(b)(6)(C)(i).

II. SoundExchange Should be Ordered to Produce Digital Distribution Agreements and Documents Reflecting Negotiations of Such Agreements Because They Directly Relate to Extensive Testimony from SoundExchange’s Witnesses.

A. SoundExchange’s Witnesses Have Submitted Testimony About Digital Distribution Agreements.

1. The Record Label Witnesses Have Submitted Testimony About Licensing Strategy and Agreements.

Record label witnesses Mark Eisenberg and Lawrence Kenswil have testified in detail about their companies’ licensing practices and strategies concerning various distributors of digital sound recordings. Their testimony generally discusses the types of license fee structures agreed to by their companies for various types of services, and cites to a few specific example contracts to further illustrate the licensing arrangements. See, e.g., Testimony of Mark Eisenberg

at 15-21; Testimony of Lawrence Kenswil at 9-13. Mr. Eisenberg's testimony, for example, explains how SONY BMG structures the license fees for online on-demand subscription services, wireless services, video streaming, and permanent download services. Eisenberg at 15-21. Mr. Eisenberg references example agreements with each type of service to establish "typical" terms in such agreements. Mr. Kenswil likewise testifies to Universal's licensing strategy and explains representative arrangements for the same types of services. Kenswil at 6-13. Like Mr. Eisenberg, Mr. Kenswil also cites example agreements that purport to contain typical terms.

2. *Drs. Pelcovits and Ordover Proffer Royalty Rates Based on an Analysis of Existing Digital Distribution Agreements.*

License agreements also formulate the basis of proffered expert testimony in SoundExchange's Direct Statement. Both Dr. Ordover and Dr. Pelcovits proffer methodologies that advocate consideration of certain existing license agreements as benchmarks for the rate the Judges should adopt.

Dr. Ordover's evaluation of SoundExchange's rate proposal discusses and relies on license agreements as appropriate benchmarks. See, e.g., Testimony of Janusz Ordover at 4 (stating that he had "review[ed] . . . marketplace transactions in related areas"); Ordover at 34 ("voluntary transactions between record companies and various licensees in the marketplace nonetheless provide useful guidelines for setting rates for the distribution of sound recordings by SDARS"); Ordover at 37 ("A final useful benchmark consists of the rates at which sound recordings are licensed to distribution channels comparable to satellite radio."); Ordover at 43 ("I also considered marketplace rates negotiated for several different distribution channels for digital music ... discussed in the submitted testimony of record company executives Mark Eisenberg

and Lawrence Kenswil, which explain the terms of payment voluntarily negotiated between the record companies and distributors operating in these channels.”). Dr. Ordoover compiles data from at least some of the agreements he reviewed in a table on page 44 of his testimony to illustrate the usefulness of these agreements as a benchmark. Ordoover at 44. Indeed, Dr. Ordoover has acknowledged during his deposition on April 26, 2007 that that his staff has been given access to approximately 500 license agreements, which he asserts they have reviewed or are in the process of reviewing.² His deposition testimony indicated that a subset of the 500 agreements was selected and will be used by Dr. Ordoover to verify the benchmark royalty rates and analysis contained in his witness statement.³ SoundExchange is withholding many of these agreements on the grounds of consent clauses and has agreed to produce them upon entry of an order by the Judges.

In addition, SoundExchange designated in this proceeding Dr. Pelcovits’ written and oral testimony from Webcaster II, the recently decided Webcasting case, Docket 2005-1 CRB DTRA (Webcaster II), wherein Dr. Pelcovits developed a rate proposal based on the record companies’ agreements with other distributors of digital music. In his written statement in Webcaster II, Dr. Pelcovits specifically relies on these agreements and summarizes their terms. See 2005-1 CRB DTRA Testimony of Michael Pelcovits at 22, 63.

² Because Dr. Ordoover’s deposition was taken on April 26, 2007, the day before the due date for the filing of this motion, a particular citation to the deposition transcript is not available.

³ SoundExchange has produced some volume of these agreements and has indicated its intention to produce some remainder of these agreements, but has allegedly been withholding their production until SoundExchange obtains authorization from licensess to disclose them pursuant to confidentiality restrictions contained therein. The irony of this position, of course, is that SoundExchange must have either previously secured waivers or violated such confidentiality provisions in furnishing the same to Dr. Ordoover and his team.

Given that the agreements sought by Movants are discussed, analyzed, and summarized in the testimony submitted by SoundExchange in this proceeding, these agreements are by definition "directly related" to SoundExchange's Direct Statement. Likewise, although Negotiating Documents related to agreements reviewed by Drs. Ordoover and Pelcovits are not specifically mentioned in the same way, Messrs. Eisenberg and Kenswil go to great lengths to discuss the negotiation process whereby the agreements came to be. Thus, Negotiating Documents related to agreements reviewed by SoundExchange's experts are directly related to SoundExchange's Written Direct Statement as well.

B. Movants Seek the Requested Documents to Test the Validity of SoundExchange's Assertions.

In Movants' First Sets of Requests for the Production of Documents submitted on February 26, 2007, Movants requested the categories of documents at issue in this motion. See First Set of Requests to SoundExchange for Production of Documents Submitted by Sirius Satellite Radio, Inc., XM Radio, Inc. and Music Choice⁴; General Requests 17, 22, 23; Pelcovits Requests 22, 43, 142, 171-72, 208, 220, 235, 251, 256, 273-74, 276-79, 303, 355, 359; Ordoover Requests 5, 218-227, 229, 230; Kenswil Requests 21-24, 35, 39, 44, 47, 49, 51-55, 60-62, 64, 65, 68, 69, 70-74, 76, 77, 78, 80, 81; Eisenberg Requests 25, 50(c), 51, 59(b), 63(b), 68(b), 72, 98(b), 101, 103, 106, 109, 110-114, 119, 120, 121, 123-26, 130, 131, 134-39. Movants sought these documents in order to assess the validity of the rate proposal set forth in SoundExchange's Direct Statement.

C. Despite Movants' Multiple Requests, SoundExchange Has Failed to Produce These Critical Documents.

⁴The relevant requests from Movants' First Set of Requests to SoundExchange for Production of Documents, along with SoundExchange's responses are set forth in Exhibit 1 to this Motion.

SoundExchange produced only the barest minimum of license agreements relied upon and/or reviewed by Drs. Pelcovits and Ordoover and did not produce any of the Negotiating Documents related to any agreements reviewed by Drs. Pelcovits and Ordoover. Moreover, SoundExchange produced only a select few of those licensing agreements requested of its fact witnesses, Edgar Bronfman, Lawrence Kenswil and Mark Eisenberg. SoundExchange's Responses and Objections concerning these requests were typical boilerplate and gave no indication of what was produced and what was withheld. See Attachment A.

On April 16, 2007 the parties met and conferred concerning discovery. At that time, SoundExchange told Movants that it did not produce a number of the requested agreements because the other contracting parties had not consented to disclosure of the agreements to Movants. On April 23, 2007, after depositions had already begun, SoundExchange produced an index listing (i) the agreements it has sought from the licensees, (ii) the agreements to which the licensees have given consent for production, and (iii) the agreements Dr. Pelcovits reviewed in the prior Webcasting case.⁵ Out of the approximately 630 agreements listed in the index, SoundExchange has produced or agreed to produce only 293. Also, SoundExchange has only produced 14 of the 46 agreements Dr. Pelcovits reviewed in Webcaster II (all of which SoundExchange produced in that matter). See 2005-1 Testimony of Michael Pelcovits at 22. Moreover, as a result of the recent depositions of Lawrence Kenswil and Mark Eisenberg and recent productions of financial documents from their respective companies, movants have learned of other agreements between Universal and Sony BMG and a number of other relevant

⁵ SoundExchange's Index of Agreements for which it has sought Consent to Produce is set forth in Exhibit 2 to this Motion.

digital music services providing similar or related music offerings, which agreements have also not been produced. SoundExchange's production of "relevant" documents therefore appears to be a carefully orchestrated cherry-picked group of agreements best supporting SoundExchange's case. Movants seek a more representative sample of agreements to assist the Judges' in arriving at an appropriate benchmark and a fair rate.

D. The Requested Documents Directly Relate to SoundExchange's Written Direct Testimony and Would Enable the Movants to Assess the Validity of SoundExchange's Rate Proposals.

1. Digital Distribution Agreements Relied Upon, Discussed Or Reviewed By Dr. Pelcovits And Dr. Ordover And The Negotiations For Those Agreements Are Directly Related to SoundExchange's Written Direct Statement.

The digital distribution agreements relied upon, discussed or reviewed by Drs. Pelcovits and Ordover are directly related to SoundExchange's written direct testimony, as are documents reflecting the negotiations of those agreements reviewed by the experts. Such documents are the foundation from which the benchmark rates proposed by Drs. Pelcovits and Ordover have been constructed. It is imperative that Movants have the opportunity to review these documents to assess the validity of SoundExchange's rate proposal. The importance of these agreements and documents reflecting the negotiation of these agreements cannot be overstated. A significant component of this proceeding will be to determine whether the agreements on which SoundExchange has relied to formulate its proffered methodologies and benchmark rates are reasonable and comparable to the services and whether the information underlying SoundExchange's experts was accurate. Deposition testimony from Mr. Kenswil and Dr. Ordover has already cast doubt on the reliability of several numbers relied upon by Dr. Ordover. It will also be highly relevant to examine whether the environment surrounding their execution was influenced by undue market power or other factors. If SoundExchange is not

compelled to produce the agreements and Negotiating Documents sought by Movants, neither Movants nor the Judges will be able to make this determination and the validity of SoundExchange's proposed rate will go untested.

This is not the first time SoundExchange has tried to protect from discovery the agreements that its experts reviewed but conveniently excluded from their discussions of appropriate benchmarks to support of SoundExchange's rate proposals. In Webcaster II, Dr. Pelcovits highlighted and summarized seventeen contracts but indicated that he had reviewed about forty contracts. SoundExchange did not produce many of these contracts, and the Judges stated that the services were "entitled" to every agreement Dr. Pelcovits reviewed, subject to third party consent, and the negotiating documents for those agreements he relied upon in his benchmark analysis. See Order Regarding Digital Media Association and Its Member Companies' Motion to Compel SoundExchange to Produce Negotiating Documents Related to Its Direct Statement, 2005-1 CRB DTRA (March 27, 2006) ("Webcaster II Order"). Indeed with respect to documents relied upon, reviewed or discussed by Dr. Pelcovits in the preparation of his testimony in Webcaster II – which SoundExchange designated in this proceeding – this Motion seeks the exact same documents the Judges ordered SoundExchange to produce before.

Nor is this the first time the recording industry has sought to shield the Negotiating Documents behind its benchmark agreements from discovery. In fact, this isn't even the second time. Yet despite their two previous losses, SoundExchange keeps trying. In the 2001 webcasting CARP proceeding, the Recording Industry Association of America ("RIAA"), the predecessor to SoundExchange, based its rate proposal on 26 agreements that it presented, but it did not originally produce any Negotiating Documents related to those agreements. Eventually

the panel ordered the production of the Negotiating Documents because they were "necessary to properly assess the parties' proposed rate methodologies and benchmarks." Order of the CARP, Docket No. 2000-9 CARP DTRA 1&2 (August 14, 2001) at 4. In fact, the information contained in the Negotiating Documents to RIAA's proffered benchmark agreements was a principal factor in the panel's decision to eliminate from consideration 25 of them. See Report of the Copyright Arbitration Royalty Panel, Docket No. 2000-9 CARP DTRA 1&2 (Feb. 20, 2002), at 45-46.

This demonstrates the vital importance of the documents Movants seek.

A similar scenario played out five years later in Webcaster II. Dr. Pelcovits presented his agreements and the services moved to compel production of the associated Negotiating Documents. The Judges granted the motion, stating that the services were "entitled to the non-privileged negotiating documents for each of the 40 agreements that Dr. Pelcovits reviewed." Webcaster II Order. Indeed, it is crucial to note that the order did not limit production of negotiating documents to the smaller subset of agreements upon which Dr. Pelcovits explicitly relied in developing his benchmark; rather, Negotiating Documents are producible for all agreements reviewed by an expert presenting a benchmark based on them. Thus, SoundExchange should produce Negotiating Documents for all agreements reviewed by Drs. Pelcovits and Ordovery in the development of the benchmarks they present in this proceeding.

2. *All Digital Distribution Agreements Relied Upon, Discussed Or Reviewed By The Label Witnesses Are Directly Related to SoundExchange's Written Direct Statement.*

The record label witnesses have testified in detail about the companies' licensing practices and strategies for distribution of digital sound recordings. Their testimony purports to describe the types of license fee structures agreed to by the record labels for various services, and

in certain instances, it cites to several specific contracts to further illustrate the licensing arrangements. See, e.g., Eisenberg at 15-21; Kenswil at 9-13. However, the few cherry-picked examples cited are insufficient; because the witnesses claim that these examples contain "common terms," Movants are entitled to all similar agreements to test the accuracy of that contention. As a result, the license agreements reviewed by Messrs. Eisenberg and Kenswil in the preparation of these statements -- as well as other relevant agreements between their respective companies and other similar types of digital music services, such as "customized radio," streamed video, on-demand audio subscription services and mobile or wireless webcasting -- are directly related to their testimony concerning license fee structures, and they should be produced.

Again, there is precedent from Webcaster II which requires SoundExchange to produce this category of documents. In Webcaster II, the Judges ordered SoundExchange to produce all of the license agreements (approximately 450 in all) brought into issue by the testimony of the experts or label witnesses, to the extent licensees consented to disclosure of those agreements. See Webcasting II Order. Through their testimony about the typical terms and their comparisons among agreements, the label witnesses have put all such agreements at issue-- if nothing else, to prove that those terms are in fact typical. Thus, it is without question that any and all license agreements entered into by the labels are directly related to the label witnesses' testimonies about those licensing arrangements. Therefore, in compliance with past precedent, the Judges should order SoundExchange to produce the license agreements brought into issue by the testimony of Messrs. Eisenberg and Kenswil.

3. *All Digital Distribution Agreements Since 2002 Between Major Record Labels And Any Licensee Offering An Identical Or Similar Service To The*

*Services In The Agreements Relied Upon Or Reviewed By The Experts
And The Record Label Witnesses Are Directly Related to
SoundExchange's Written Direct Statement.*

Also directly relevant to the assessment of the validity of SoundExchange's rate proposal are any other agreements since 2002 between the major record labels and any licensee offering an identical or similar service to Movants and that were relied upon or reviewed by SoundExchange's expert and label witnesses. Specifically, these materials provide the most effective means of determining whether SoundExchange and its label witnesses have "cherry picked" the universe of relevant agreements with the various types of distributors of digital sound recordings in order to put in evidence only those agreements with terms most favorable to SoundExchange's inflated rate proposal. It would be fundamentally unfair to permit SoundExchange to rely on a small subset of handpicked agreements with a small subset of services as alleged benchmarks while denying Movants the opportunity properly to evaluate them against the universe of other agreements covering the same or similar types of services.

Again, prior proceedings support Movants with respect to this category of documents. The Judges' Webcasting II Order brought into issue by the testimony of the proffered experts or label witnesses is sufficiently broad to encompass other agreements between the record labels and any licensee offering an identical or similar service as those licensees that are party to agreements relied upon or discussed by Dr. Pelcovits or the record label witnesses in SoundExchange's Direct Statement. Thus, SoundExchange should be compelled to produce these documents as well.

4. *All Digital Distribution Agreements Since 2002 Between A Representative Sample of Both Major And Independent Record Labels And Each of the Following: (i) DMX; (ii) Muzak; (iii) Subscription On-demand Music Services; (iv) "Customized Radio;" (v) Digital Jukeboxes; (vi) On-demand*

Video Streaming Services; (vii) Pre-programmed Video Streaming Services; And (viii) Mobile or Wireless Subscription or Ad-supported Digital Radio or Webcasting Are Directly Related To SoundExchange's Written Direct Statement.

Digital distribution agreements between a representative sample of both major and independent record labels and each of the following services are also directly related to SoundExchange's written direct testimony: (i) DMX; (ii) Muzak; (iii) subscription on-demand music services (both portable and non-portable); (iv) "customized radio" (meaning non-DMCA compliant webcasting or other digital audio transmissions; whether offered on a subscription or as supported basis); (v) digital jukeboxes; (vi) on-demand video streaming services; (vii) pre-programmed video streaming services; and (viii) mobile or wireless subscription or ad-supported digital radio or webcasting. Again, a critical component of this proceeding will be to address evidence casting doubt on the comparability and usefulness of SoundExchange's proffered benchmark agreements. The agreements SoundExchange puts forth as benchmarks involve dissimilar services that have wholly different functionalities from the Services involved in this proceeding. They primarily represent a select handful of agreements with carefully designated digital partners by only two record companies -- Sony BMG and Universal -- that they have relied upon. Draft and other agreements between the various services enumerated above and labels other than Sony BMG and Universal -- including agreements with smaller independent record labels -- could shed important light on the economic, competitive, and programming circumstances surrounding the parties' licensing considerations on a more representative industry-wide basis. Without these agreements, SoundExchange's witnesses' claims and assertions cannot be accurately scrutinized, and their relevance to the statutory market cannot be

measured. The Judges should therefore order SoundExchange to produce these documents as well.

E. The Confidential Nature of Record Company Agreements Does not Protect Them From Discovery.

SoundExchange asserted in the meet and confer that it is withholding production of these crucial documents because it is not permitted to produce confidential contracts between its member record labels and certain licensees without authorization. SoundExchange takes this position despite the "attorney's eyes only" nature of the Protective Order, which was crafted by the Judges to protect just such information, and despite the fact that many of the agreements it is withholding were produced in the prior proceeding.

SoundExchange's position is disingenuous and borders on bad faith. It has known since at least October of last year, when it filed its Written Direct Statement, that the requested documents are directly related to its written direct case. SoundExchange could have obtained the necessary consents months ago.⁶ Indeed, as discussed earlier, many of the agreements sought here have already been disclosed to SoundExchange's experts and, according to the Webcaster II Order, were produced either voluntarily or under compulsion.. Thus, for these documents at least, obtaining timely consent should not have been difficult. Nevertheless, SoundExchange has thus far failed to produce 32 of the 46 agreements reviewed by Dr. Pelcovits and produced in that proceeding. Again, according to the Webcaster II Order, every single one of these exact same agreements was produced in that proceeding. If the third parties consented to their production a year ago, it is difficult to believe that they withholding consent now. SoundExchange simply

⁶ Indeed, Music Choice began notifying all of the parties to its agreements with confidentiality provisions that their agreements would be produced in this litigation (pursuant to a protective order) immediately after it filed its Written Direct Statement and has produced to SoundExchange hundreds of confidential agreements in this proceeding.

cannot credibly argue that it has reasonably sought consent for production of these agreements and has no adequate justification for its refusal to produce them.

In addition, while SoundExchange claims that authorization is required from the contracting parties, in Webcaster II, SoundExchange did not always treat lack of consent as an obstacle to production. For example, as the Judges will recall, SoundExchange introduced Music Choice's confidential audit documents -- which were protected as confidential by statute, not simply by private agreement -- forcing Music Choice to make an emergency motion to the Judges. See Order Granting Music Choice's Motion to Maintain Confidentiality, Docket No. 2005-1 CRB DTRA (December 4, 2006). SoundExchange did not even notify Music Choice that it intended to produce these documents in Webcaster II much less request consent to disclose them.

Sound Exchange's position conflicts with well-settled case law that "documents are not shielded from discovery merely because they are confidential." DIRECTV, Inc. v. Puccinelli, 224 F.R.D. 677, 684-85 (D. Kan. 2004) (internal footnotes omitted); Am. Guar. & Liab. Ins. Co. v. CTA Acoustics, Inc., 2007 U.S. Dist. LEXIS 26485, at *11-12 (E.D. Ky. Apr. 9, 2007) (acknowledging statement made in DIRECTV); Conopco, Inc. v. Wein, 2007 U.S. Dist. LEXIS 27339, at *14 (S.D.N.Y. Apr. 4, 2007) (stating that "the simple fact that the parties to the settlement agreement agreed to its confidentiality does not shield it from discovery."); Grynberg v. Total S.A., 2006 U.S. Dist. LEXIS 28854, at *7 (D. Colo. May 3, 2006) (stating that "documents are not immune from discovery merely because they are subject to contracts requiring that they be maintained confidentially."); see also Adams v. Cooper Indus., 2007 U.S. Dist. LEXIS 22199 (E.D. Ky. Mar. 13, 2007) ("a general concern for protecting confidential

information does not equate to privilege” and even if it did the protective order entered in the case protected the non-party’s interest in maintaining the confidentiality of the agreement); Cadmus Communs. Corp. v. Goldman, 2006 U.S. Dist. LEXIS 85108, at *9-13 (W.D.N.C. Nov. 17, 2006) (noting that “litigants may not shield otherwise discoverable information from disclosure to others merely by agreeing to maintain its confidentiality” and ordering production of settlement agreement where any legitimate interest defendants may have had in that agreement could be preserved by a protective order).

For all these reasons, the Judges should order that these documents be produced on an expedited basis of two days following the decision on this motion. Many of the requested agreements are already in SoundExchange’s possession. Nevertheless, SoundExchange has steadfastly refused to produce those documents absent an order from the Judges compelling production. Movants therefore respectfully request that the Judges issue the order that SoundExchange demands.

III. The Documents Sought are Highly Relevant To This Proceeding and Unless SoundExchange is Ordered to Produce the Requested Information, the Judges’ Ability to Resolve This Proceeding Will Be Substantially Impaired.

A. The Documents Sought Are Relevant To This Proceeding.

The documents Movants seek are highly relevant to this proceeding and the underlying expert testimony offered by SoundExchange. Indeed, these agreements are the basis of a portion of SoundExchange’s rate proposal. Movants need to review the broader universe of SoundExchange’s license agreements and related Negotiating Documents -- with smaller independent labels as well as the two major labels furnishing documents -- to assess the validity of SoundExchange’s rate proposal. To achieve a just resolution of this proceeding, Movants and the Judges must also have the opportunity to review negotiating documents related to the

agreements relied upon as benchmarks, which may reveal highly relevant economic, competitive, and programming circumstances surrounding the parties' licensing considerations. A review of only those agreements cherry-picked by SoundExchange and its expert witnesses to support SoundExchange's rate proposal is wholly inadequate.

B. Without Production of the Requested Documents, The Judges' Ability to Resolve This Proceeding Will Be Substantially Impaired.

Absent the discovery sought, the Judges' resolution of this proceeding would be substantially impaired because they will not be able to properly assess SoundExchange's proposed benchmark agreements in context. Without a full production of all requested licensing agreements and the negotiations related to agreements relied upon by SoundExchange's experts, the Judges will be limited to the universe of agreements selected by SoundExchange in order to obtain its preferred result. It would be fundamentally unfair to permit SoundExchange to rely on a small subset of handpicked agreements with a small subset of services as alleged benchmarks and deny the Judges any opportunity to compare those hand-picked agreements with the larger universe of agreements covering the same or similar types of services that might have substantially different—and less favorable--terms.

C. The Burden Imposed on SoundExchange to Produce These Documents is Minimal.

The burden imposed on SoundExchange to produce the requested documents is minimal as compared with the high probative value of these documents to the Judges' assessment of a fair royalty rate in this proceeding. Based on past experience, SoundExchange should have been able to anticipate Movants' requests and plan for them in a way that minimizes the burden. Moreover, SoundExchange has apparently already identified and

collected a large number (though admittedly not all) of the requested agreements, as evidenced by the index it produced to Movants of the agreements for which it has sought consent.

D. The Requested Information Is Not Readily Available to the Movants in a Form Less Burdensome for SoundExchange to Produce.

The requested documents are not available at all to Movants unless and until SoundExchange is required to produce them. The documents are in the possession, custody or control of SoundExchange or the witness-represented companies. SoundExchange is the party with the best knowledge of the location and existence of the requested documents, and moreover, is the party with control over these documents.

CONCLUSION

Since the requested documents directly relate to the assertions made by SoundExchange with respect to SoundExchange's rate proposal, and as Movants require these documents to assess the specific assertions made by SoundExchange, Movants respectfully request that the Judges compel their production.

Respectfully submitted,

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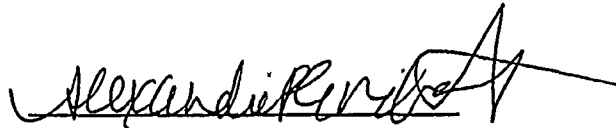
April 27, 2007

CERTIFICATE OF SERVICE .

I hereby certify that the foregoing Motion to Compel SoundExchange to Produce Label License Agreements and Related Negotiating Documents was served on April 27, 2007 via overnight mail on the following party:

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**RESTRICTED—Subject to Protective Order in
Docket No. 14-CRB-0001-WR (2016-2020) (*Web IV*)**

Exhibit F